

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

JOCELYN TOMPKIN, ETC., ET AL., )  
 )  
Plaintiffs, ) Judge David D. Dowd, Jr.  
 ) Akron, Ohio  
vs. )  
 ) Civil Action  
AMERICAN BRANDS, INC., ET AL., ) Number 5:94CV1302  
 )  
Defendants. )

TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE

THE HONORABLE DAVID D. DOWD, JR.,

JUDGE OF SAID COURT, AND A JURY,

ON MONDAY, OCTOBER 1, 2001.

VOLUME 6

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25 Proceedings recorded by mechanical stenography; transcript  
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1 THE COURT: Good morning. Please be seated.  
2 MR. COFER: Your Honor, before the jury comes  
3 in, we have another motion to renew.  
4 THE COURT: Go ahead.  
5 MR. COFER: We would like to renew our motion  
6 to exclude the testimony of Dr. Sidransky under Federal  
7 Rule of Evidence 702, Daubert and its progeny, and we would  
8 also incorporate by reference our motion in limine.  
9 THE COURT: Very well. I've already written  
10 on that. I don't intend to change my mind, but you've  
11 protected the record.  
12 Your motion is overruled.  
13 MR. COFER: Thank you, Your Honor.  
14 THE COURT: Are we ready to go forward?  
15 MR. SMITH: Yes, sir.  
16 MR. COFER: There is one other matter, Your  
17 Honor.  
18 Mr. Smith showed me some of the exhibits he  
19 would like to use with Dr. Sidransky this morning. One of  
20 the exhibits is a "Time" magazine article. We object to  
21 that as hearsay, as not relevant, and under 403 grounds as  
22 more prejudicial than probative.  
23 THE COURT: I won't let you show the article,  
24 but if you want to inquire about him whether he's been  
25 recently recognized by "Time" magazine, you may do that.

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1 MR. COFER: Thank you.  
2 THE COURT: Get the jury.  
3 (Jury in).  
4 THE COURT: Good morning. Please be seated.  
5 You may call your first witness.  
6 MR. SMITH: Thank you, Your Honor.  
7 The plaintiff would call Dr. David Sidransky.  
8 DAVID SIDRANSKY,  
9 of lawful age, a witness called by the Plaintiff,  
10 being first duly sworn, was examined  
11 and testified as follows:  
12 DIRECT EXAMINATION OF DAVID SIDRANSKY  
13 BY MR. SMITH:  
14 Q. Would you state your name, please, sir?  
15 A. I'm Dr. David Sidransky from Johns Hopkins

16 University.  
17 Q. And -- forgive me. Johns Hopkins University?  
18 A. Yes.  
19 Q. Is your -- that is where you do your work?  
20 A. Correct.  
21 Q. Would you tell us of your schooling, please,  
22 Dr. Sidransky?  
23 A. I went to --  
24 Q. And forgive me one second. For the benefit of jurors  
25 taking notes, would you please spell your last name,

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1 please, sir?  
2 A. Sure. Sidransky is spelled S-I-D-R-A-N-S-K-Y.  
3 Q. Thank you.  
4 Would you please tell us of your schooling,  
5 sir?  
6 A. I went to college in Brandeis University, went to  
7 medical school in Baylor College of Medicine in Houston,  
8 Texas. I then finished internal medicine residency program  
9 there and went to Johns Hopkins in the late eighties to do  
10 a fellowship in oncology.  
11 I then became board certified in medical  
12 oncology, and obtained a faculty position in 1992 at Johns  
13 Hopkins in the departments of otolaryngology which is ear,  
14 nose and throat, and in oncology.  
15 Q. And you have been with Johns Hopkins since when,  
16 then? You started there approximately when?  
17 A. Like, I arrived in 1988 and I've been there ever  
18 since, so I guess 13 years ago.  
19 Q. Currently what work are you doing at Johns Hopkins,  
20 please, Dr. Sidransky?  
21 A. The -- when I started as the faculty, I opened up my  
22 own laboratory and we began to explore the genetic changes  
23 that occur during the occurrence of cancer. Specifically  
24 we targeted tumors that are related to smoking. In  
25 particular, lung cancer and head and neck cancer.

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1 For the last decade or so we have been  
2 working in trying to elucidate or understand what are these  
3 genetic changes, what the timing of these genetic changes  
4 are and how they are related to smoking.  
5 My lab has also been particularly interested  
6 in using these genetic changes to detect cancers early. We  
7 are also developing diagnostic tests in urine, blood and  
8 sputum to try to catch cancers in the earliest time when  
9 they are the most curable.  
10 Q. And the field that you are working in is called what?  
11 A. I would say generally it would be referred to as  
12 cancer genetics.  
13 Q. And cancer genetics has been taking place at a  
14 serious level for approximately how many years, the work on  
15 it?  
16 A. Well, I really think that seriously it probably began  
17 in the late seventies and early eighties with models  
18 suggesting that certain cancers could be inherited and were  
19 probably genetic.  
20 By the mid-eighties there was a lot of  
21 groups, including my mentor Burt Vogelstein, who had been  
22 to work on actual tumor samples.  
23 THE COURT: What was the name of your mentor?  
24 THE WITNESS: Burt Vogelstein.  
25 THE COURT: How do you spell that?

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1 THE WITNESS: V-E-O-G-E-L-S-T-E-I-N.  
2 THE COURT: Doctor, one more thing.  
3 THE WITNESS: Yes.  
4 THE COURT: As many doctors do, you speak  
5 very quickly.  
6 THE WITNESS: Okay.  
7 THE COURT: And the court reporter is  
8 wonderful, but the faster you speak, the harder it is for  
9 her to get your testimony accurately.  
10 So if you would just slow the pace down a  
11 little bit, it will help.  
12 THE WITNESS: Okay. I'll try to do that.  
13 A. So we, Burt Veogelstein and others, began for the  
14 first time to look at actual tumor samples where you could  
15 actually take a cancer that was taken out of a person, take  
16 out the DNA, and then by a variety of molecular methods you  
17 could actually look for genetic changes which include  
18 mutations of genes and large chromosomal aberrations or  
19 chromosomal deletions.  
20 And I think that really spurred the whole  
21 area of cancer genetics forward because once you could look  
22 at the primary tumors, you could begin to tease apart what  
23 are the specific genetic changes in the cancer, how they  
24 progress over a period of time, and then you could begin to  
25 look for specific associations with things such as tobacco  
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1 and other things.  
2 Q. Dr. Sidransky, I think for maybe openers would you  
3 tell us, please, what is cancer?  
4 A. Well, I think that the best way to start to think  
5 about cancer is not something that happens when you take,  
6 for example, your first cigarette and it's done. It's a  
7 long, long process.  
8 We now know that cancer takes 20 to 30 years  
9 to form. That the seeds of the cancer are planted long  
10 before a patient ever comes in with something that is  
11 called, let's say for example, lung cancer. And that this  
12 process is the result of an accumulation of multiple  
13 genetic changes.  
14 So whether you inherit some genetic changes,  
15 rarely, or whether you acquire them through carcinogens  
16 that are present in things such as cigarette smoke, there  
17 are always genetic changes that are involved in the cancer  
18 process.  
19 And this period of time can even be longer,  
20 and it's necessary for the cancer cell to become what we  
21 describe clinically as something that's a tumor, that is  
22 dangerous to the patient, can invade and eventually  
23 metastasize as well.  
24 Q. And would you tell us what is a chromosome, please?  
25 A. Well, when we are talking about generally genetics,  
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1 we talk about the DNA that's involved that tells a cell  
2 what to do.  
3 So you have a cell, and inside the cell is  
4 kind of the brains of the cell which is called the nucleus,  
5 and inside the nucleus is all our DNA or genetic material  
6 that tells us, of course, tells a cell what it is and  
7 describes who we are eventually in life.  
8 And a cancer cell essentially has the same  
9 genetic information.  
10 This information is packed up very tightly  
11 into things that we call chromosomes. The reason the cells

12 do that is because it allows them to separate out the DNA  
13 right when they replicate and do other things. You can't  
14 let it lie around, so it's packed in some of these things  
15 called chromosomes.  
16 And chromosomes essentially contain DNA, and  
17 within the DNA are the genes that control everything that  
18 happens in the cell. And when they go awry, when something  
19 happens to them, they can cause a mutation, they can cause  
20 something different to happen which is the result  
21 potentially resulting in cancer.  
22 Q. Would you mind drawing a chromosome for us?  
23 A. Sure.  
24 MR. SMITH: If he may. May he do so?  
25 THE COURT: Sure.

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1 A. Let me start, if I may, let's start with a regular  
2 cell. And let's start with a --  
3 THE COURT: Let's give him the mike.  
4 MR. SMITH: Oh, yes, sir.  
5 A. Okay. So this is a cell and that's the nucleus.  
6 Again this is kind of the brains that tells the cell  
7 everything what to do.  
8 If we kind of blow this up, what we will find  
9 is that this genetic material is packed up into these  
10 things that we call chromosomes. We have 23 pairs so they  
11 are numbered -- they are actually numbered 1 through 22.  
12 And there's actually the two extras which are the sex  
13 chromosomes X and Y which tells us to be a male or female.  
14 Each of us gets a pair of chromosomes, one  
15 from mom and one from dad. So we have two copies of every  
16 gene, two copies of every chromosome.  
17 So what I would like to do is let me just  
18 draw you more or less what they would look like if you were  
19 to actually look under a microscope for an individual pair  
20 of chromosomes. So this is just one pair. There's 22  
21 others like it.  
22 This is exactly what's called a centromere  
23 which is the way -- the centromeres, which is the way that  
24 chromosomes are anchored in the cell.  
25 And an additional thing when people start

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1 looking through the microscope is that they begin to  
2 describe what they call chromosomal arms. They are not  
3 arms like what we have, but they kind of look like arms  
4 which is just the projections that they see coming out.  
5 And they call them the short arm, if it was smaller, and  
6 the Q arm if it was longer.  
7 So that just became the convention.  
8 So what happens, if you have a pair of  
9 chromosomes, the easiest way to describe what you are  
10 talking about is simply to say, okay, this is -- let's say  
11 chromosome nine, so we have two copies; again one from mom  
12 and one from dad.  
13 This is the short arm, and this is the long  
14 arm. So this is chromosome nine. This is the short arm.  
15 We refer to that as chromosome -- chromosomal arm 9P. Just  
16 the way to figure out where you are talking about in terms  
17 of what's going on.  
18 Now, the chromosomes contain the critical  
19 genetic information. And if I can blow it up one more  
20 time, what I'd like to do is show you that it looks pretty  
21 solid but it isn't. In fact, if you were to just kind of  
22 blow one area up of the chromosome, what you would see is

23 DNA that's just wound like this. It has some anchoring  
24 proteins which help hold it in place so it looks packed  
25 like that on the chromosome. But this is actually DNA  
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1 itself, and that's the critical genetic material that tells  
2 a cell what to do.

3 It's the one that makes the RNA which is the  
4 message, and the message makes the protein which is what  
5 helps the cell function in every which way.

6 This DNA is then organized into genes. So I  
7 will blow it up one more time. And if you actually take  
8 two strands of DNA, a piece of the DNA encodes what's  
9 called the gene. And these, of course, are the actual  
10 things that tell us, each cell what to do. There are about  
11 50,000 of them.

12 Many of you have heard we have actually  
13 cloned the entire genome, and we know what all the genes  
14 are on these human chromosomes.

15 Importantly for cancer, it's these genes that  
16 are actually present in our cell that can, one, become  
17 mutated; you can actually change the sequence of the DNA  
18 which is called the mutation. Or you can lose a gene which  
19 is called a deletion.

20 And cancer is actually the accumulation of  
21 both activating events, kind of accelerators in cells.  
22 Think of like a truck where you might, for example, if you  
23 mutate a certain gene, you might have a stick stuck on the  
24 accelerator so the truck doesn't stop the way it's supposed  
25 to, just keeps going.

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1 Then we have genes which are deleted which  
2 are inactivated, the function is lost, and think of them  
3 really as kind of brakes in a truck. If the brakes are  
4 gone, the truck can't stop, also.

5 So either way, these genes can be changed.  
6 And if it's the right genes, genes critical for cancer,  
7 then once they are mutated, you can actually have a cell  
8 that begins to behave and look like a cancer cell.

9 Q. Thank you very much, Dr. Sidransky.

10 Is there a phrase known as polymorphic  
11 markers?

12 A. Yes, the morphic markers is a really complicated way  
13 of saying markers that differ from one person to another.

14 So for example, if you consider each gene to,  
15 let's say, be an apple, if you have two red apples, you got  
16 a red apple from mom and one from dad, you can't tell the  
17 difference, they are not polymorphic. But if you got a red  
18 one from mom and a yellow one from dad, you can tell the  
19 difference. That's polymorphic; that means they differ.

20 These markers are very important to us for a  
21 variety of reasons. First of all, they help us distinguish  
22 one person from another.

23 If we have enough markers right, we can tell  
24 if one individual is who we think they are or somebody  
25 else. That's why polymorphic markers, we refer to them  
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1 also as microsatellites, can distinguish one person from  
2 another. And they are used in things such as forensic  
3 testing to identify a crime scene. They are also used, for  
4 example, in paternity testing, to figure out whose child it  
5 is, because with enough of these markers, you can be very  
6 certain it's either from one parent or another.

7 In cancer they have been very valuable to us

8 because they allow us to distinguish those two copies of  
9 the chromosomes. So instead of just looking the same,  
10 let's say chromosome 9 with both of them having the little  
11 short arm, the P arm, and also their long arm, we can now  
12 distinguish markers that allow us to tell us that one came  
13 from mom and one came from dad.

14 When we do that, we can test actual DNA  
15 material from a cancer cell, and what we are looking for is  
16 whether both copies are still there, whether we have both  
17 the red apple and the yellow apple. If one of the copies  
18 is gone, if the yellow apple is gone, we know that a  
19 deletion has taken place.

20 One of the markers should be there because  
21 it's present in the person's normal blood or normal tissue.  
22 But when we look at the actual cancer, it's gone. So we  
23 know that that cancer has lost a piece of the chromosome.

24 And we know that these chromosomal losses  
25 knock out genes, so-called tumor suppressor genes, or genes  
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1 that are inactivated in the progression -- these brakes  
2 again in the truck, if you want to -- and that that has  
3 lead to the cancer process.

4 So for many years now we have been using  
5 these markers to identify these chromosomal deletions or  
6 pieces of chromosomes that have been knocked out in cancer  
7 progression.

8 Q. And when they are knocked out, that means that what  
9 happens when it's gone?

10 A. What happens when you knock out a critical gene is  
11 that a normal cellular function, something that the cell is  
12 supposed to do at a certain time, doesn't happen.

13 For example, let's say the cell is stimulated  
14 to grow and then to stop, what may happen is the cell is  
15 stimulated to grow, but the brake isn't there to tell it to  
16 stop so it continues to grow. In the simplistic sense that  
17 is what is cancer; a cell that is out of control, out of  
18 its normal growth characteristics.

19 So these chromosomal deletions are an  
20 integral part of cancer progression.

21 Q. Dr. Sidransky, would you tell us what takes place  
22 regarding the development of a tumor over time?

23 A. Well, what happens is probably a little more  
24 complicated than we have just described because what we  
25 described is really one change, let's say one chromosomal  
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1 deletion or one mutation.

2 But I already said the cancer takes a long  
3 period of time to happen. And the reason is that you  
4 actually have to accumulate a lot of genetic changes. A  
5 cell has to be very different, a cancer cell has to be very  
6 different than its normal counterpart to look at and behave  
7 like a cancer.

8 And generally we believe there's about ten  
9 genetic changes, ten hits that have to happen on the cell  
10 before it actually becomes a cancer cell.

11 That, of course, is why a lot of people, for  
12 example, smoke and don't get cancer, because if you don't  
13 get all the genetic changes that you need to get a  
14 full-blown cancer, you won't see it clinically. You need  
15 to have this accumulation of genetic changes.

16 And this accumulation sets off enough of  
17 these accelerators or brakes that finally the cell can't  
18 control itself and acts as a clinical cancer.

19 Q. The transformation of a cell after its first hit, how  
20 long a period of time can that take place?  
21 A. Well --  
22 Q. Or approximately?  
23 A. We refer to transformation essentially as a  
24 characteristic change in a cell that essentially puts it on  
25 the pathway to cancer.

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1 You can think of cells all sitting nicely  
2 outside of a highway, and if one gets a genetic change, it  
3 kind of goes into the highway like a car and begins to  
4 move.

5 You are not going to get cancer until you get  
6 on that highway because all your cells are sitting there,  
7 they are comfortable, they are very nice to each other.  
8 It's only when they finally can get on to the highway and  
9 they begin to move, that there is a chance that they  
10 eventually will become a cancer.

11 And so, therefore, that initial  
12 transformation, the first hit, changes a cell subtly. It  
13 may not be quite as easy to stop growing. It may respond a  
14 little bit more than some of its surrounding cells to  
15 growth signals. So something begins to happen to it.

16 And it kind of gets on this highway and it  
17 begins the process, which is still a long process before  
18 it's ever going to become cancerous, and it begins slowly,  
19 but that can happen very quickly after the first genetic  
20 change, albeit subtle sometimes. It is now on the cancer  
21 progression pathway and on that highway.

22 Q. Dr. Sidransky, would you tell us, please, what a  
23 clonal selection is?

24 A. What happens is when the cell gets one of these  
25 changes, let's say a mutation or chromosomal deletion and

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1 gets on to this highway, it has an advantage.

2 Clonal selection means that a single cell has  
3 more of an advantage than the surrounding cells. So all  
4 the other normal cells, which are kind of good buddies, now  
5 stay behind, and this cell says, you know, I don't respond  
6 well to what's going on around me so I may grow a little  
7 bit more than my counterparts. I may bulge out a little  
8 bit more. I may live a little bit longer. Sometimes  
9 that's all it takes. All the other cells may live and die  
10 a certain time. This one may live a little bit longer.  
11 That's clonal expansion.

12 What happens is because of that first change,  
13 more -- it makes more daughter cells, more clones of itself  
14 than the surrounding cells. So they expand relative to the  
15 normal cells that are left behind.

16 Q. And can you tell us whether or not these are  
17 advantages that they have over the surrounding normal  
18 cells?

19 A. Well, by definition, to have a clonal expansion means  
20 that you have to have some advantage over the cells that  
21 are -- that surround that, that abnormal cell. And that is  
22 essentially the way you get a larger and larger pool of  
23 these abnormal cells that go on to this highway that's  
24 leading to cancer.

25 Q. And incidentally, I'm not going to use this phrase

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1 each and every time, but I am asking that if, as far as  
2 opinion questions go today, Dr. Sidransky, if any opinions  
3 that you do express would be based upon reasonable medical



4 certainty, please, would that be okay?  
5 A. Yes.  
6 Q. Does this clonal selection that this -- this cell  
7 that's had the chromosomal change, does it have an impact  
8 upon whether or not the -- any cells are dominant over any  
9 other cells in the system?  
10 A. Well, it definitely does. That's the way that they  
11 get an advantage and they dominate over other cells.  
12 And the more changes, say if you have one  
13 change, you may be a little bit dominant, by the time you  
14 accumulate two or three changes, you become quite dominant.  
15 That cell begins to outgrow much more quickly the  
16 surrounding cells, and eventually that causes what we call  
17 tumors, abnormal tissue cells that are out of control and  
18 moving faster and faster down that highway.  
19 Q. Does this situation lead to changes that can be  
20 identified by a pathologist?  
21 A. Some of the changes can be seen by a pathologist.  
22 Some of the earliest changes are hard to see  
23 sometimes because the cell looks so much like a normal  
24 cell, that you have to know what's going on in the DNA to  
25 even know it's different. But as a cell accumulates more

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1 genetic changes, it begins to look different.  
2 The size of its nucleus may change; the edge  
3 of the cell, the regularity of which -- that outer membrane  
4 looks may begin to change.  
5 It also may begin to look different when it  
6 goes together with its neighbors. It may begin to look  
7 what we call -- like what we call dysplasia which means  
8 it's no longer organized in the right manner.  
9 And there's several of these characteristics  
10 that a pathologist can identify that are what we call  
11 precursors or pre-neoplastic cells, cells on the highway  
12 but don't have all the changes yet that make it into an  
13 invasive clinical cancer that we define in the clinical  
14 setting.  
15 Q. Are these -- can you tell us what the phrase genetic  
16 alteration means?  
17 A. Well, genetic alteration then really means that it's  
18 either a change at any place from the chromosome down into  
19 the actual gene sequence.  
20 So it's either a chromosomal change, a change  
21 in the DNA itself like a deletion of a part of the genome,  
22 or an actual change in the gene itself.  
23 But all these genetic alterations are what  
24 drives the cancer process, what puts the cells on the  
25 highway and helps them along.

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1 Q. Can these be seen at different levels?  
2 A. Yes. And we describe all of them in cancer genetics.  
3 At the very gross level, just working our way  
4 down, you can see them as chunks of chromosomes that are  
5 missing. You can actually stain the chromosomes at the  
6 very top where we still see the P arm and the Q arm, and  
7 sometimes you can see a chunk missing with the normal  
8 staining patterns and you know you have a chromosomal  
9 deletion.  
10 Sometimes the chromosomes are all messed up;  
11 one piece of chromosome 9 may be stuck on to a piece of  
12 chromosome 4. That also causes genetic changes that are  
13 critical for cancer, and that's another way that cancer  
14 cells acquire these genetic alterations.

15 And as you work your way down, you can  
16 actually look at the DNA itself, right down to the gene  
17 level, there's ways of actually knowing or understanding  
18 what each of the normal building blocks are at the DNA, and  
19 you can see a change, a mutation.

20 And a genetic mutation occurs in some of  
21 these critical genes just as much as it does in the  
22 chromosomes.

23 Two classic genes, just as an example, for  
24 example, in cancer, let's take an activator, one of those  
25 accelerators in the truck again that, if you keep that

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1 stick down, it will just keep going, one of the classic  
2 activators and in adenocarcinoma of the lung, the lung  
3 cancer that we are talking about here, is K-Ras. It's a  
4 gene which normally helps send some signals to proliferate,  
5 and it can be mutated right at the DNA level.

6 You can have one single building block is  
7 changed. Most commonly in lung cancer, because of some of  
8 the carcinogens in cigarette smoke which we called tobacco  
9 specific nitrosamines, that can bind directly to the DNA,  
10 and when it replicates which cause a mutation, make an  
11 error in the way the building block is put in there.

12 They can activate the cell. It will grow  
13 without much control and start the process of cancer.

14 Another one that is classically described is  
15 the P53 gene. The P53 gene resides on chromosomal pair 17.  
16 It's a classic tumor suppressor gene. It's like a break in  
17 the cell.

18 When you look at cancer cells, sometimes they  
19 have a specific mutation in P53 that knocks out that gene.  
20 There's no brake, so the cell continues to grow. Right at  
21 the DNA level, you can actually look at those changes and  
22 see those P53 mutations in the actual DNA from tumors.

23 Q. Dr. Sidransky, you mentioned a nitrosamine in  
24 tobacco?

25 A. Yes.

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1 Q. What is a nitrosamine, please?

2 A. Nitrosamines are chemical compounds that are present  
3 as constituents of burning tobacco.

4 Nitrosamines are one specific group of these  
5 compounds, and they can form what are called adducts which  
6 is that they can bind the DNA building blocks. And what  
7 happens is when normal enzymes in cells go through and look  
8 at these adducts, these big compounds that are stuck on  
9 there, they can make a mistake and put in the wrong  
10 building block.

11 THE COURT: How do you spell nitrosamines?

12 THE WITNESS: Nitro, N-I-T-R-O, sa, S-A and  
13 then means M-I-N-E-S.

14 THE COURT: Thank you.

15 Q. Dr. Sidransky, what is a polycyclic aromatic  
16 hydrocarbon, please?

17 A. This is another group of compounds.

18 Q. And I apologize, if you would please spell it.

19 A. Polycyclic, P-O-L-Y-C-Y-C-L-I-C, hydro, H-Y-D-R-O,  
20 carbons, C-A-R-B-O-N-S.

21 MR. COFER: I think you missed "aromatic,"  
22 Doctor.

23 THE WITNESS: Aromatic, A-R-O-M-A-T-I-C.

24 Q. Thank you, sir.

25 A. This is another group of compounds that again are

1 constituents of cigarette smoke, and we know they can bind  
2 specific DNA sequences, cause these adducts, these bulky  
3 adducts where the compound actually sticks on to a building  
4 block.

5 In P53, for example, it's been shown some of  
6 the areas where we see the most common mutations in cancer  
7 are the areas where these adducts specifically bind to the  
8 DNA.

9 What's important about these particular  
10 chemical studies is that it provides a very direct link  
11 between the compounds in cigarette smoke and the causation  
12 of cancer.

13 The most common constituents perhaps in  
14 cigarette smoke are the ones that we know bind some of the  
15 most common genes and cause some of the most common  
16 mutations that we see in lung cancer.

17 MR. COFER: Excuse me, Your Honor. The  
18 question was what are polycyclic aromatic hydrocarbons.

19 I haven't been interrupting the witness, but  
20 I would ask that we proceed in a question and answer format  
21 so I can make objections, if appropriate.

22 THE COURT: All right. Let's move on.

23 Try to limit your response to the question.

24 THE WITNESS: Okay.  
25

1 BY MR. SMITH:

2 Q. Dr. Sidransky, would you tell us what happens when  
3 cigarette smoke is inhaled, please?

4 A. Well, what happens is when tobacco is essentially  
5 burned, there are certain chemicals that are released that  
6 are part of that burning process. And when somebody  
7 smokes, they inhale those.

8 They go into the lung, they are deposited on  
9 cells, they go through a process of metabolism which means  
10 they are changed by the body. The body sees these, and  
11 there are certain chemical things the body tries to do to  
12 them, mostly trying to inactivate these type of compounds  
13 and make them nonreactive.

14 But sometimes the body also changes them in a  
15 way they become even more reactive. Once these changes  
16 occur, these compounds can actually enter through cells,  
17 make their way into the DNA, and then bind the DNA as we  
18 talked about.

19 Q. And the process that you've indicated to us already  
20 begins to occur?

21 A. That's correct, where you either get specific point  
22 mutations, or the damage can be such that it causes DNA  
23 nicks or double stranded breaks that could cause  
24 chromosomal deletions.

25 Q. Dr. Sidransky, can you tell us whether or not

1 cigarette smoke contains other items which are dangerous  
2 with respect to the topic we have?

3 A. Well, cigarette smoke contains over a hundred  
4 constituents. Some have been better studied than others.

5 The ones that have been most closely  
6 implicated with these type of changes are the two that we  
7 mentioned already, the polycyclic aromatic hydrocarbons and  
8 the tobacco-specific nitrosamines.

9 There are some others that have been shown in  
10 tissue culture to potentially, when cells are grown, let's

11 say, in a dish, to cause some of these other changes.  
12 But those are the major categories.  
13 Q. And this -- give you a chance to get a glass of  
14 water.  
15 When did science begin to become aware of  
16 what you have been telling us here today, please?  
17 A. Well, I really think that cancer genetics, again  
18 probably in the mid-eighties, began to get a good grasp of  
19 what was going on.  
20 But it was really in the late eighties and  
21 around '89, '90, '91 where a series of articles were  
22 published that showed an increase in the number of K-Ras  
23 mutations, one of these specific activators, in tumors from  
24 patients that smoked compared to tumors from patients that  
25 did not smoke cigarettes.

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1 So if you were -- if you had lung cancer but  
2 you did not smoke, the DNA was compared to a cancer from a  
3 patient that did smoke, and there was a large difference in  
4 the frequency or the number of these mutations from smokers  
5 compared to nonsmokers.  
6 Q. If one is to look at a tumor of a smoker and a  
7 nonsmoker, are there differences that may be found?  
8 A. Well, we talked about K-Ras as being one of the  
9 earliest.  
10 P53 has been one that has been commonly  
11 tested, one of these tumor suppressors or these  
12 inactivating changes.  
13 Mutations of P53 are much more common in the  
14 tumors of smokers compared to nonsmokers.  
15 And then really since about the mid-nineties,  
16 a little bit, '97 or so, chromosomal deletions were  
17 studied.  
18 Q. And a chromosomal deletion is what you have explained  
19 to us earlier?  
20 A. These chromosomal deletions, pieces of chromosomes  
21 that can be knocked out.  
22 Q. Yes, sir.  
23 A. And also knocked out -- important genes were also  
24 found to be different in terms of frequency where we saw  
25 more chromosomal deletions in tumors from smokers than

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1 nonsmokers at a specific chromosomal location.  
2 Q. What is an allele, please?  
3 A. Allele is just one copy of each gene or each segment  
4 of the DNA we get, so it's kind of the -- back to the red  
5 apple, yellow apple. The red apple would be one allele, a  
6 brown eye would be one allele, blue eyes would be another.  
7 THE COURT: Would you spell that?  
8 Q. Spell that.  
9 A. Allele is A-L-L-E-L-E.  
10 Q. And can you tell us whether or not, if you look at  
11 tissue from a smoker and a nonsmoker, can you see  
12 differences there with respect to alleles?  
13 A. What we do to look for these chromosomal deletions is  
14 we need to have some normal DNA from the patients. It can  
15 be blood DNA, it could be normal tissue. Noncancerous  
16 tissue is all we need.  
17 It's very important because that tells us  
18 what are the alleles which are the copies that are there.  
19 Is it a red apple and a red apple, a red apple and a yellow  
20 apple? In the area we are looking at, we need to know  
21 there are two alleles so we can distinguish the two copies.

22                   Then we take the DNA out of a tumor and we  
23 compare and say does it have both alleles there. And if,  
24 let's say, the yellow apple is missing, we know one of the  
25 alleles is gone and this allele has carried with it, the

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1       one that's gone, has deleted several critical genes.

2                   The ability to show these chromosomal  
3 deletions is important in understanding cancer progression.

4 Q.     Have there been recent studies and advances with  
5 respect to understanding the risk that cigarette smoke  
6 imposes?

7 A.     Well, I assume related to the alleles?

8 Q.     Yes, sir.

9 A.     So again I think in, you know, starting in about '97,  
10 articles began to be published looking at some of the  
11 common chromosomes that we know are involved in cancer  
12 progression.

13                  Common chromosomes include chromosome 17 P.  
14 That's where the P53 gene resides.

15                  Chromosome 9, which I diagrammed there,  
16 chromosome 9 has a critical gene called P16, often lost  
17 early in cancer progression.

18                  Chromosome 3P, chromosomal arm 3P has one or  
19 two genes -- which we are not sure exactly which ones are  
20 yet -- but lost in a lot of cancers often early as well.

21 Q.     Can -- excuse me. I didn't mean to interrupt you.

22 A.     And basically these studies began to show if you  
23 looked at these specific chromosomal regions, you saw a  
24 higher frequency of deletions in tumors from smokers  
25 compared to nonsmokers.

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1 Q.     Would it be of benefit to the jury if you were to  
2 possibly put some of these numbers up that you are  
3 referring to, these gene numbers?

4 A.     Sure.

5                  THE COURT: You can use the next sheet, if  
6 you would, please.

7                  THE WITNESS: Okay.

8                  THE COURT: Give him the mike again.

9                  MR. SMITH: Thank you.

10 A.     Okay. So just to reiterate the chromosomal numbers  
11 that are important, we have again chromosomes are numbered  
12 simply from one to 22, plus the X and Y chromosomes, the  
13 sex chromosomes.

14                  And we have chromosome 3 and the short arm  
15 which is chromosome 3P. We don't know what gene is there  
16 for sure. We have a couple candidates, but it hasn't been  
17 proven yet.

18                  Chromosome 9P, P16 is the critical gene  
19 there.

20 Q.     What does that mean?

21 A.     The critical gene? The gene that's the target; that  
22 we know that that's the gene that is probably the target of  
23 that deletion, the one that's critical for loss during  
24 cancer progression.

25 Q.     And that's in a chromosome that is identified as 9P?

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1 A.     Correct.

2 Q.     And just very briefly, can you tell us whether or not  
3 these numbers are numbers that are arbitrarily given when  
4 researchers discover them?

5 A.     Well, basically the chromosomes have different sizes,  
6 so the biggest one was called one and the smallest one was

7 called 22.  
8 So 3 is pretty big, 9 is somewhat smaller, 17  
9 is even smaller. It's just based on that.  
10 17P, which is another critical chromosomal  
11 arm, is smaller than 9. It has the P53 gene.  
12 And one that we found that -- recently that  
13 is also very common in lung cancer and is also more common  
14 in smokers is a gene on 19P. And we now are pretty certain  
15 that that gene is LKB1.  
16 So for a lot of these chromosomal arms, we  
17 know what the target gene is, or looking at genes we think  
18 are the target genes. These four are among the most common  
19 losses that are seen. 3P, 9P and 17P have been studied for  
20 many years. We recently added 19P as a common change as  
21 well.  
22 Q. Dr. Sidransky, when you put P up there, I think  
23 earlier you had a P and a Q?  
24 A. Yes.  
25 Q. And P represents what?

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1 A. The short arm. And Q represents the long arm of the  
2 chromosome.  
3 Q. Sometimes is there a third arm?  
4 A. No.  
5 Q. They always have two arms?  
6 A. Two -- sometimes they don't have -- really the small  
7 arm is so small you almost can't see it, but they all have  
8 essentially a short and a long arm.  
9 Q. So the targets you've looked at here as seeming to be  
10 important are all the short arms of those particular  
11 chromosomes?  
12 A. Yes.  
13 Q. Thank you very much.

14 Dr. Sidransky, would you please tell us what  
15 the word epithelium means?  
16 A. Epithelium is the lining or covering of most organs  
17 and tissues in our body. And when you think about it, you  
18 need bone and muscle to hold everything in place, but then  
19 you need an epithelium that does different kinds of things.  
20 For example, in your lungs it secretes  
21 mucous; in effect, gets rid of some stuff that gets down  
22 there. In the stomach, that epithelium, that lining of  
23 cells, has to secrete acid to digest food and helps absorb  
24 nutrients. In the kidney, for example, that lining may be  
25 important in trying to get rid of some toxins in our body

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1 and dump them into -- essentially into urine.  
2 So the epithelium is very specialized, and  
3 it's the lining of cells that covers most of our organs.  
4 Q. Can you tell us whether or not in the arms that  
5 you've looked at -- and I guess I would like to ask one  
6 other question before we do that, for clarity.  
7 I think you've explained to me that within  
8 these arms, there are some numbers given to various regions  
9 within them, is that correct?  
10 A. Yes.  
11 Q. And would you just tell us a little bit about that,  
12 in case these numbers come up later on, that the jury may  
13 be able to put them into perspective in their mind?  
14 A. Sure. What happens when we are looking for these  
15 polymorphic markers, these markers that vary from one  
16 person to another, they were discovered over a period of  
17 many years. Before the human genome project was complete

18 and we knew what the entire DNA sequence was in our body,  
19 many of us spent some time looking for these markers  
20 because they were valuable for us in identifying areas of  
21 deletion and looking for genes.

22 Cancer geneticists like to look for genes;  
23 that's one way to do it. You kind of need to find sign  
24 posts along the way. And what happened is they were  
25 basically designated with a few numbers and symbols.

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1 So you might hear something like, for  
2 example, D9S171. And all D9S171 means is that it's an  
3 anonymous marker; that is, it's not a gene, that was found  
4 by some investigator on 9, D9S, that's why it's 9, on  
5 chromosome 9. And 171 means of all the ones being pulled  
6 out, it was the 171st marker.

7 So this complicated numbering and lettering  
8 system just means it's a marker on chromosome 9 that is  
9 polymorphic. And we need these because --

10 Q. And again "polymorphic" means?

11 A. They vary from one person to another.

12 Q. Okay.

13 A. And we need these because when we want to look for  
14 chromosomal deletions, we need to know what the markers  
15 are.

16 So once we knew we had a marker in a given  
17 region, we could look for that marker to find that  
18 chromosomal deletion.

19 Q. So the chromosomes were given numbers based upon  
20 biggest having one, smallest 19, and ranging in between?

21 A. Correct.

22 Q. But these other numbers in there were pretty much  
23 artificially given --

24 A. Correct.

25 Q. -- within them?

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1 A. There's no rhyme or reason. They could have two  
2 numbers completely different right next to one another.

3 It had to do with the way they were being  
4 pulled out as people were looking at DNA.

5 Q. Now, if you could explain to us, please, the  
6 importance of 3P or the chromosome arms known as 3P, 9P,  
7 17P and 19P when it comes to looking for cancerous changes  
8 between smokers and nonsmokers.

9 A. Well, in the -- really about five years ago I guess  
10 was the first articles beginning to come out looking at a  
11 very simple question: Is there a difference in these  
12 common chromosomal changes between tumors from smokers  
13 versus nonsmokers.

14 And this is based on the hypothesis --  
15 hypothesis is just a scientific method of establishing an  
16 idea which needs to be tested, and that hypothesis was that  
17 there will be a difference and there will be a difference  
18 between smokers and nonsmokers because there are specific  
19 carcinogens in cigarette smoke that are different than the  
20 normal things that we are exposed to in people that don't  
21 smoke.

22 These differences will cause differences in  
23 the chromosomal changes and chromosomal deletions.

24 And that hypothesis was tested by looking at  
25 tumors from smokers and nonsmokers. For example, first

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1 with chromosomal arm 3P. And investigators found that  
2 there was about a four-fold difference between losses on

3 chromosomal arm 3P in smokers compared to nonsmokers. That  
4 study was also repeated by another group looking at  
5 chromosomal arm 3P.  
6 9P followed. 9P is also a common loss. 9P  
7 was compared in tumors with smokers versus nonsmokers. It  
8 was found that there was about a three-fold difference,  
9 about three times as many losses on 9P in tumors from  
10 smokers compared to nonsmokers.  
11 17P was also compared, mostly by looking at  
12 the specific gene P53. We've already talked about that,  
13 that P53 mutations were done actually in the earlier  
14 nineties and have been done continuously and have  
15 repeatedly shown significant differences, large differences  
16 of two to three-fold between smokers and nonsmokers as  
17 well.  
18 And 19P was added just this February where  
19 because we found it was a common change, we also tested it  
20 in smokers and nonsmokers and we found that there was a  
21 significant difference again between losses on chromosomal  
22 arm 19P in smokers and nonsmokers.  
23 THE COURT: Let's put it over there where the  
24 screen is so we can all see it. If you need to go back to  
25 the chart later, you can do that.

1111

1 Q. Dr. Sidransky, would you please tell us what  
2 Plaintiff's Exhibit 8611 is?  
3 A. This is a figure from our paper in February of this  
4 year, and it was Fig. 1, I believe, divided into two  
5 segments. The top panel is A and the bottom panel is B.  
6 The top panel is actually -- represents  
7 microsatellite analysis, the actual testing of these  
8 alleles, these polymorphic alleles that vary from one  
9 person to another and from one chromosomal arm to another,  
10 in actual normal and tumor samples from patients with  
11 cancer.  
12 And the bottom is essentially a frequency  
13 distribution of how often we see these losses in smokers  
14 compared to nonsmokers. The blue is smokers, and the red  
15 is nonsmokers.  
16 Q. Dr. Sidransky, I guess before we go to your paper  
17 maybe, how was it that you happened to become involved with  
18 this particular case involving David Tompkin?  
19 A. Well, I got a call from Allan Feingold who described  
20 to me a patient who had smoked about at least 15 pack  
21 years, 15 -- that's approximately one pack of cigarettes a  
22 year for about 15 years.  
23 THE COURT: I don't think you need to go into  
24 what you were told.  
25 You were contacted by Feingold?

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1 THE WITNESS: Correct.  
2 A. And he asked me basically if I would be interested in  
3 looking at a case.  
4 Q. And did you decide to do so?  
5 A. Reluctantly.  
6 I don't like to do many of these cases, and I  
7 told him that I really didn't have the time to do it.  
8 Q. And did you eventually decide to do it?  
9 A. Well, when he told me that it was a case of a person  
10 that had smoked --  
11 MR. McLAUGHLIN: Objection.  
12 MR. COFER: Your Honor.  
13 THE COURT: Yeah. What he told you is not



14 admissible.  
15 MR. SMITH: Okay.  
16 THE COURT: You eventually decided to  
17 participate in the case, I gather?  
18 MR. COFER: Your Honor, I think he relies on  
19 part of what Dr. Feingold told him, so I have no objection  
20 to him describing generally the information he had.  
21 THE COURT: I thought I had I heard an  
22 objection.  
23 MR. McLAUGHLIN: I withdraw the objection.  
24 THE COURT: Well, you know, you've got to be  
25 fish or foul. You can't be one object and one not object.  
1113  
1 Put another question to the witness. Let's  
2 start over.  
3 MR. SMITH: Yes, sir.  
4 Q. Dr. Sidransky, you did decide to examine this case,  
5 is that correct?  
6 A. I think it would be kind of an interesting detective  
7 case to try to figure out what changes would be there and  
8 whether they would be compatible with smoking or  
9 nonsmoking.  
10 THE COURT: The answer is yes?  
11 THE WITNESS: Yes.  
12 Q. And that was the reason why?  
13 A. Yes.  
14 Q. I'm going to touch on some of your research work in  
15 more detail before we are done, but did part of your  
16 research involve a paper that was published this year in  
17 February of 2001?  
18 A. Yes, it did.  
19 Q. And would you tell us about that paper, please?  
20 First of all, its name and where it appeared?  
21 A. Sure.  
22 Q. And you can refer to your file, with the Court's  
23 permission.  
24 A. The title of the paper is "Chromosomal alterations in  
25 lung adenocarcinoma from smokers and nonsmokers."  
1114  
1 It appeared in the advances and brief section  
2 of a journal called Cancer Research in February 15th of  
3 this year.  
4 Q. And that paper was published before you ever heard of  
5 this case, is that correct?  
6 A. Correct.  
7 Q. And the purpose of that paper was --  
8 THE COURT: Wait a minute. Wait a minute.  
9 Wait a minute.  
10 Who wrote the paper?  
11 THE WITNESS: The paper was written by myself  
12 and my post-doctoral fellow who is called Montserrat,  
13 M-O-N-T-S-E-R-R-A-T, Sanchez-Cespedes, that's  
14 S-A-N-C-H-E-Z-dash-C-E-S-P-E-D-E-S.  
15 There are other co-authors as well, but we  
16 were the two major authors.  
17 THE COURT: Thank you.  
18 Q. Did this involve a collaborative effort from  
19 different locations?  
20 A. Yes, in order to try to accumulate as many nonsmoking  
21 tumors as we could find, we predominantly obtained them  
22 from Johns Hopkins which is where we work at. A couple  
23 tumors came also from Wisconsin where I have some  
24 connections there as well. And also some from Spain

1 investigators.

2 Q. So you included other regions in order to find enough  
3 nonsmoking tumors, is that what you are saying?

4 A. Correct.

5 Q. How many persons were involved in this study insofar  
6 as your subjects, the people you were examining?

7 A. We examined only tumors. We didn't examine people  
8 themselves.

9 Q. Yes, sir.

10 A. But we examined the tumors from 45 patients diagnosed  
11 with adenocarcinoma of the lung. That included 27  
12 patients' tumors who had -- either currently were smoking  
13 or had smoked in the past, and 18 patients and their tumors  
14 which where they had not been exposed to cigarettes.

15 Q. And what did you do?

16 A. Well, we essentially carried out a similar  
17 investigation to what we've described as we've gone through  
18 the cancer process.

19 We wanted to look at microsatellite markers,  
20 these polymorphic markers that vary from one person to  
21 another, at some of these key chromosomal regions.

22 But we also wanted to do more than that. We  
23 wanted to test a series of markers that would go across all  
24 the autosomes that exist, so essentially all the 22 pairs  
25 of chromosomes, to try to not only confirm previous studies

1 in some of these chromosomal changes that had been seen  
2 before, more commonly in smokers than nonsmokers, but also  
3 to see if we could identify additional areas that would be  
4 different potentially between tumors from smokers and  
5 nonsmokers.

6 Q. The concept of looking at chromosomal changes and  
7 making determinations relative to whether there is cancer  
8 or the cause of the cancer, now, again that has taken place  
9 for approximately how many years?

10 A. I'd say at least a decade.

11 Q. And with respect to doing that, can you tell us some  
12 of the organs that have been examined or some of the forms  
13 of cancer?

14 A. Well, there's a lot of different types of cancers  
15 where chromosomal deletions play an integral part.

16 We talked about the fact it's important  
17 really for cancer in general.

18 I think suffice it to say here other  
19 smoking-related tumors like head and neck cancer, for  
20 example, cancers of the lip, tongue, back of the mouth,  
21 throat and the voice box which are commonly associated with  
22 smoking have also been examined for chromosomal deletions,  
23 and changes have also been seen between tumors from smokers  
24 and nonsmokers.

25 Q. In your paper, under the introduction, if you would

1 please look at that for a moment with us?

2 A. Okay.

3 Q. It indicates what with respect to lung cancer so far  
4 as its -- how common it is?

5 A. Well, what it says, of course, is that lung cancer is  
6 commonly associated with tobacco smoke, and one of the  
7 interesting things of course is that there are -- while 90%  
8 of the people that get lung cancer as a general rule are  
9 smokers, about 10% of those that get lung cancer don't

10 smoke.  
11 And it would be interesting and one of the  
12 reasons we wanted to do this study, to try to identify what  
13 are the genetic changes in tumors from nonsmokers compared  
14 to smokers.  
15 Q. And of the 90% of the people that get it are smokers,  
16 10% are not, and you wanted to be able to examine  
17 chromosomes to try to determine if you could understand  
18 what was happening to different chromosomes?  
19 MR. COFER: Objection. Leading. Asked and  
20 answered.  
21 THE COURT: Sustained. He's already answered  
22 the question.  
23 MR. SMITH: Okay. Yes, sir.  
24 THE COURT: You are just repeating what he's  
25 already told the jury.

1118

1 Q. Did you indicate what is the most common cause of  
2 cancer death in this paper?  
3 THE COURT: He already said that, 90%  
4 smoking.  
5 MR. SMITH: No, I meant that was of cause of  
6 lung cancer.  
7 THE COURT: Oh, excuse me.  
8 Q. Which form of -- which organ is attacked the most and  
9 causes death in cancer?  
10 A. In smoking, you mean?  
11 Q. Of any type.  
12 A. Of any type. Well, lung cancer is the leading cause  
13 of death in the United States of cancer.  
14 Q. And 90% of that is from smoking?  
15 A. Correct.  
16 Q. Okay. What did you then do after you had selected  
17 the 44 patients?  
18 THE COURT: 45. It was 45.  
19 MR. SMITH: 45, yes, sir. Thank you.  
20 Q. 45 of them, 28 were smokers, 17 non.  
21 What did you then do?  
22 MR. COFER: That's wrong. It's 27 and 18.  
23 THE COURT: Wrong. 27 and 18, a ratio of  
24 three-to-two.  
25 THE WITNESS: 27 and 18.

1119

1 A. What we did is we wanted to basically scan the genome  
2 and look at all these chromosomes, so we actually picked  
3 microsatellites that went across all these chromosomal  
4 regions and basically tested them and compared normal  
5 DNA -- which for most of these patients is lymphocytes or  
6 normal white blood cells from their blood -- and compared  
7 it to the DNA in the actual tumor samples themselves to  
8 identify these chromosomal deletions.  
9 Q. What did you then do after you identified this  
10 information?  
11 A. Well, we began to basically plot it out and try to  
12 look at the patterns. And what we did is -- may I approach  
13 to show the losses?  
14 Q. With the Court's permission, yes.  
15 THE COURT: Certainly. Give him the mike.  
16 MR. SMITH: Turn the mike on, though. There  
17 is a little button there.  
18 A. So let me just go over the microsatellite analysis to  
19 show what we did.  
20 This is one of those numbers we were talking

21 about, D3S1296. D means anonymous; 3S on chromosomal arm  
 22 three, 3P; and the numbers 1296, it happened to be number  
 23 1296 that was picked out of chromosome 3.  
 24 This is a tumor sample, lung cancer 841;  
 25 that's just something we use in the lab to identify that  
 1120  
 1 tumor.  
 2 This lane -- and it goes straight down there  
 3 this way -- N means normal. That's the normal DNA from the  
 4 patients, usually again white blood cells that are just  
 5 taken from the blood, that's the normal DNA.  
 6 Tumor is actually the actual tumor DNA, so we  
 7 crunch up the tumor, extract the DNA material and we test  
 8 it with the same marker.  
 9 What happens is when you have a polymorphic  
 10 marker, one that distinguishes the two, you see two bands  
 11 like here. One band distinguishes one chromosome from mom  
 12 and the other one, let's say, from dad. When you look at  
 13 the tumor, there is no difference here, there is no loss at  
 14 that particular marker. It's the same. The tumor and the  
 15 normal look the same.  
 16 When you look at this marker, this is  
 17 chromosomal arm 5, D5S421, you see two bands here in this  
 18 particular tumor, you don't see the band there. That band  
 19 is gone because a piece of chromosome is gone. That's a  
 20 chromosomal deletion.  
 21 The arrows are pointing to the ones that are  
 22 positive, the ones that we have seen chromosomal deletions,  
 23 in just a small sampling of the patients to give an example  
 24 of the type of analysis that was done.  
 25 When we were talking about chromosomal arm  
 1121  
 1 19, D19S and the marker number is 424. Here you see two  
 2 bands. You see almost complete absence of one band.  
 3 That's a chromosomal deletion; a piece of the chromosome is  
 4 actually gone in the tumor sample.  
 5 Once we found these microsatellite deletions  
 6 or chromosomal losses, we then just basically plotted the  
 7 frequency, that is how many times was chromosomal arm 9P  
 8 lost in tumors from the smokers, in the blue, versus tumors  
 9 from nonsmokers, in the red.  
 10 And we just plotted them out by the most  
 11 common losses kind of heading down, so that's why it looks  
 12 like -- this chromosome order here is not based on the  
 13 normal order that we -- you know, based on size. It's  
 14 based on the frequency of losses.  
 15 So the most common loss was on chromosomal  
 16 arm 9P which you can tell from the graph here is about 60%  
 17 of tumors from smokers in the blue, and just under 25% in  
 18 tumors from nonsmokers.  
 19 And then we moved our way down, and you can  
 20 see that there's big differences in chromosomal arm 9P  
 21 between smokers and nonsmokers.  
 22 On 19P again a big difference, much more  
 23 frequent, much higher frequency of loss for smokers versus  
 24 nonsmokers.  
 25 And really almost across the board there are  
 1122  
 1 more losses seen in the tumors from smokers than  
 2 nonsmokers, but it's not true for every chromosome.  
 3 As you get down here, you really begin to see  
 4 that they are about the same. So these chromosomal arms  
 5 are also interesting to us because we think they may be

6 involved in tumors from nonsmokers, may be one of the ways  
7 nonsmokers get cancer.  
8 Q. Thank you.  
9 What did you then do after you made those  
10 determinations and you calculated the tumors from smokers,  
11 the tumors from nonsmokers as reflected in the blue and the  
12 red on the graph?  
13 A. What we essentially then did is just a statistical  
14 calculation.  
15 You can see quite obviously that there's  
16 differences. Differences in small sample numbers sometimes  
17 can be due to chance alone. So what you do is a -- simply  
18 a chi squared for a student's T test to compare two  
19 populations or two groups of tumors really here, smokers  
20 and nonsmokers. And you determine whether, based on  
21 statistics, whether these differences are real or not or  
22 they are just due to chance alone.  
23 And we did that for each of the chromosomal  
24 arms, to identify those differences.  
25 Q. With respect to the David Tompkin case, what did you  
1123  
1 do?  
2 A. Well, in the case of David Tompkin, we basically  
3 tested the tumor and normal tissue in the very similar  
4 fashion.  
5 What we did is take -- in his case we had  
6 normal kidney from the autopsy -- that's normal tissue, no  
7 cancer on it -- and compared it to the adenocarcinoma  
8 itself, the actual lung cancer itself.  
9 We extracted DNA from both the normal kidney  
10 and the tumor, and once the DNA was isolated, once we had  
11 it in our hands, we did the exact same type of  
12 microsatellite analysis, but for a limited number of  
13 markers.  
14 And I basically chose chromosomal arm 9P, 3P,  
15 17P and 19P because 3P, 9P and 17P have all been implicated  
16 before as being different between smokers and nonsmokers,  
17 in our work and those of others as well. And because 19P,  
18 we essentially added it from this paper in the sense that  
19 we identified it as a very common loss, you'll see it's  
20 actually the second most common loss.  
21 And what I was interested in doing was seeing  
22 whether the pattern would be consistent with that of a  
23 smoker or a nonsmoker.  
24 Q. Did you -- do you have a document with us -- with you  
25 that shows the results in picture -- a picture of them?  
1124  
1 A. Yes, I do.  
2 MR. SMITH: May I approach the witness, Your  
3 Honor?  
4 THE WITNESS: (Handing).  
5 MR. COFER: Thank you.  
6 MR. SMITH: Might we put this on the Elmo,  
7 Your Honor?  
8 THE COURT: Does it have an exhibit number?  
9 MR. SMITH: It's 8613.  
10 THE COURT: Let's get the witness to identify  
11 it, that that's the exhibit number.  
12 Q. Is that correct, sir?  
13 A. Yes.  
14 THE COURT: What is 8613, please?  
15 THE WITNESS: 8613 is essentially images that  
16 have been taken from the microsatellite analysis that we

17 did on Mr. Tompkin's tumor.  
18 THE COURT: Thank you.  
19 THE WITNESS: Okay.  
20 BY MR. SMITH:  
21 Q. Dr. Sidransky, would you please tell us what is  
22 reflected by Exhibit 8613?  
23 A. So again these are the microsatellite panels that we  
24 showed from the paper and that were done on Mr. Tompkin's  
25 actual tissue specimens.

1125

1 Q. Which one is -- and these are pairs all throughout,  
2 is that correct?  
3 A. That is correct.  
4 So each kind of gray panel under each of the  
5 numbers is actually a pair. One lane is the normal DNA,  
6 and the other lane is the tumor DNA.  
7 Q. Which lane is the normal DNA, please?  
8 A. The normal DNA is always on the left, so the left  
9 lane on each of the panels is the normal DNA, and the one  
10 on the right is always the tumor DNA.  
11 Q. And what did you determine from these?  
12 A. Well, if you can see the arrows, they are actually  
13 pointing to the areas where we identify chromosomal  
14 deletions.  
15 So if you can stop -- start at the top set of  
16 panels, at the upper left-most corner, thank you, yes, that  
17 marker again is D3S1067, again a marker on chromosomal arm  
18 3, and you can see that in the normal DNA, there's two  
19 major bands, and one of those bands is missing which is  
20 pointed by the arrow in the actual tumor sample.  
21 So we know that the tumor, this lung cancer  
22 from Mr. Tompkin, actually has a chromosomal 3P deletion.  
23 The next panel, which is the middle panel on  
24 the top, is D3S1300. That's another marker a distance away  
25 from that one on chromosomal arm 3P, and that's retained,

1126

1 it does not show loss, as well as the one all the way on  
2 the right. And this is not uncommon because the deletions  
3 can be large, but don't encompass all of the chromosomal  
4 arm, and that's often why we use multiple markers to  
5 identify the deletions.  
6 The bottom panel, there are two markers that  
7 are on chromosome 9, chromosomal arm 9P. The left-most  
8 panel on the bottom has D9S171 on the left, and you can see  
9 that there are two bands in the normal DNA and again  
10 virtually complete absence of the band, the top band  
11 pointed out by the arrow in the tumor sample.  
12 The next panel is also from chromosomal arm  
13 9P. Interferon is not too far away from D9S171.  
14 Q. What is that, please?  
15 A. I talk about the fact a lot of these have anonymous  
16 numbers because they are just found in the DNA in a certain  
17 region.  
18 If they are close to or on a gene, they are  
19 sometimes designated by the gene itself. They are not  
20 necessarily in the gene, but near the gene or close to it.  
21 Interferon was one such marker which was  
22 found near the interferon A gene, so it's called interferon  
23 A. It's very close to the interferon gene on 9P, and you  
24 can see the top end is gone, designated by the arrow, so  
25 this is clearly a chromosomal arm 9P deletion here.

1127

1 Next one is TP53 and that is a marker very

2 close to the P53 gene. That marker does not show a loss.  
3 That's on chromosomal arm 17P.  
4 And we did one more marker on chromosomal arm  
5 19P that's D19S411, and you can see there is loss in the  
6 bottom the way the pattern is changed and that is  
7 indicative -- that indicates a deletion on chromosomal arm  
8 19P.  
9 Q. Thank you, sir.  
10 MR. COFER: Are you through with the overhead  
11 or are you going to put it back on?  
12 MR. SMITH: Okay.  
13 MR. COFER: I can't sit there, is the reason  
14 I ask.  
15 MR. SMITH: No, go ahead.  
16 MR. COFER: Thank you.  
17 Q. Dr. Sidransky, based upon your education and your  
18 experience, your examination of the tissue of David Tompkin  
19 that you have examined, do you have an opinion, based upon  
20 reasonable medical certainty, as to a proximate cause of  
21 David Tompkin's lung cancer?  
22 A. I believe that smoking was a major contribution to  
23 his lung cancer.  
24 Q. And why do you say that?  
25 A. I say that based on the chromosomal deletion pattern  
1128  
1 that we saw in the tumor itself. If you look back to the  
2 chart here, chromosomal arm 9P, 19P and 3P were lost, which  
3 are very commonly lost in tumors from smokers.  
4 You can actually do a simple statistical  
5 method to figure out what the probability is that this  
6 pattern is either due to smoking or nonsmoking.  
7 And all you do is, since each chromosomal arm  
8 is independent, each loss is independent, you basically  
9 multiply the chances that you'd see that loss in a  
10 nonsmoker.  
11 Q. Would you tell us that one more time, please, and  
12 explain it to us?  
13 A. Sure. You would take each of the chromosomal arm  
14 frequencies that occur in a nonsmoker and multiply them  
15 together to figure out what the chances would be that it  
16 would occur in a nonsmoker, that these chromosomal arm  
17 deletions would occur in a nonsmoker.  
18 Q. With the Court's permission, would you be willing to  
19 write that out --  
20 A. Sure.  
21 Q. -- what you did here, please?  
22 A. Okay. We had losses on chromosome 9P, 3P and 19P.  
23 The chances of getting a loss on chromosomal  
24 arm 9P, if you are a nonsmoker, is only 22%. So only 22%  
25 of nonsmokers in our study had a chromosomal arm 9P loss.  
1129  
1 So that 22% is designated as 0.22, 22%.  
2 We look at chromosomal arm 3P, only 5% of  
3 nonsmokers in our study had loss on chromosomal arm 3P.  
4 That's 0.05.  
5 If you look at chromosomal arm 19P, 16% of  
6 nonsmokers had loss on chromosomal arm 19P.  
7 Each of these losses is pretty rare in a  
8 nonsmoker, but we also identified three independent losses.  
9 Independent events statistically are multiplied together to  
10 figure out what the chances are that all three would be  
11 lost in a nonsmoker.  
12 So you basically multiply them together, and

13 the answer ends up being, I believe -- the last digit, I'm  
14 pretty sure, is close to that -- it's .0015, which means  
15 that there's a greater than 99% chance that this pattern  
16 would occur in a smoker compared to a nonsmoker.

17 So we felt very confident by doing this  
18 analysis that this pattern was most consistent with a  
19 smoker compared to a nonsmoker.

20 Q. The chances of that occurring in a non -- if someone  
21 did not smoke, the odds would be 99-to-1 that that would  
22 not happen?

23 A. Correct.

24 Q. And if they were a smoker, the odds would be what?

25 A. All right. Well, that actually is --

1130

1 Q. I apologize. Forgive me.

2 Based upon that, what are the odds that David  
3 Tompkin was a smoker and that the smoking caused these  
4 changes that you referred to in 9P, 3P and 19P, please?

5 A. All right. Well, I think the odds are a hundred to  
6 one that this tumor is likely to be due to smoking versus a  
7 nonsmoker.

8 Q. And when you say that, the exact percentile is what;  
9 between 99 and a hundred, but closer to a hundred?

10 A. Correct.

11 Q. Thank you.

12 Dr. Sidransky, I would like to go over your  
13 curriculum vitae a little bit, please.

14 Have you been involved with any federal  
15 research organizations, please?

16 A. I'm currently on the Board of Scientific Counselors  
17 of the National Institute of Dental and Cranial Facial  
18 Research. It's part of the National Institutes of Health.  
19 And I advise them on the way that they expand and use their  
20 what's called intramural programs, the programs that are  
21 funded for use internally.

22 I also am chairman of the Early Detection  
23 Research Network which is a large consortium of 36 centers  
24 sponsored by the National Cancer Institute to understand  
25 molecular markers, develop them and try to introduce them

1131

1 into clinical translational situations.

2 Q. And I want to touch on one other thing, too.

3 I want to go into some of your writing in  
4 this field, but there are others writing and publishing in  
5 this field as well, is that correct?

6 A. That is correct.

7 Q. And are there other papers that precede, for  
8 instance, your February, 2001 paper that look at changes in  
9 chromosomes with an effort or with a goal of making  
10 predictions as to the causes of those changes, please?

11 A. Yes. There's really -- there's about five or six  
12 papers from three major groups. One of them is our own.

13 The other one is Gabriella Sozzi's group in  
14 Italy, and the other one is Tom Kelsey's group in Boston  
15 which have published papers on differences between smokers  
16 and nonsmokers for chromosomal deletions.

17 Q. I'm going to ask you to look at your CV for a minute  
18 with me, with respect to some of the articles you've listed  
19 there.

20 THE COURT: I'm not sure the jury knows what  
21 "CV" means.

22 MR. SMITH: Yes, sir. Thank you, Your Honor.

23 Q. Tell us, please, what a CV is. Forgive me.



24 A. Curriculum vitae.  
 25 Q. And what does that mean? They get used in these 1132  
 1 cases, but they are not a word that's used everyday at the  
 2 dinner table.  
 3 A. One way of looking at them is really kind of the  
 4 highlights of somebody's professional training as well as  
 5 usually their major publications.  
 6 Q. And I would like you, please, to look at the section  
 7 of your curriculum vitae that is captioned Articles  
 8 Published in Professional Journals.  
 9 A. Okay. I don't know if I have a copy of that with me.  
 10 Q. Let me give you mine.  
 11 A. Okay.  
 12 Q. I'd like you, first off, if you would please stop --  
 13 MR. SMITH: Your Honor, might I stand near  
 14 the witness to look at that?  
 15 THE COURT: Sure.  
 16 Do you have it -- are you going to want to  
 17 introduce that? Does it have an exhibit number?  
 18 MR. SMITH: It does not. I would like to  
 19 mark it.  
 20 THE COURT: Why don't we put an exhibit  
 21 number on it?  
 22 MR. SMITH: (Marking).  
 23 Q. Dr. Sidransky, I would like to go over a little bit  
 24 with you Exhibit 8614, if I might.  
 25 A. Okay. 1133  
 1 Q. Would you tell us, please, about the first paper on  
 2 there, when it was published?  
 3 THE COURT: Well, wait a minute.  
 4 Is Exhibit 8614 your curriculum vitae,  
 5 Doctor?  
 6 THE WITNESS: Yes, it is my curriculum vitae.  
 7 THE COURT: Is it current?  
 8 THE WITNESS: There's probably a few  
 9 publications that haven't been added to the end.  
 10 THE COURT: All right. But it describes  
 11 basically the history of your work to this date, with a few  
 12 exceptions?  
 13 THE WITNESS: That is correct.  
 14 THE COURT: All right. Go on, please.  
 15 MR. SMITH: Thank you, sir.  
 16 BY MR. SMITH:  
 17 Q. Number one, 1991, what was the topic?  
 18 A. Well, the title is "Identification of P53 Gene  
 19 Mutations in Bladder Cancers and Urine Samples." It was  
 20 published in a journal called "Science."  
 21 Q. Number two?  
 22 A. Number two is a review on P53 mutations in human  
 23 cancer published in "Science," same year, 1991.  
 24 Q. Three?  
 25 A. Number three is another analysis looking at P53 1134  
 1 mutations and specific type of brain tumors published in  
 2 "cancer research."  
 3 Q. Four?  
 4 A. A particular paper on the way P53 functions in cancer  
 5 cells, published in "Cancer Research" in 1991.  
 6 Q. Five?  
 7 A. Five was a paper published on the way that P53 leads  
 8 to the progression of brain tumors, in 1992.

9 Q. Six?  
 10 A. Another paper looking at different types of P53  
 11 analysis in human cancers.  
 12 Q. These are dealing with mutational changes?  
 13 A. They are all dealing with changes, genetic  
 14 alterations in human cancers.  
 15 Q. 1992, number seven.  
 16 A. That is entitled "Clonal Origins of Bladder Cancer,"  
 17 where we describe the way bladder cancer cells populate a  
 18 bladder over a period of time. That was published in the  
 19 "New England Journal of Medicine" in 1992.  
 20 Q. Eight?  
 21 A. Eight was the first paper identifying gene mutations  
 22 in the bodily fluid. We identified mutations of Ras, one  
 23 of these activators, in the stool of patients with  
 24 colorectal cancer, and that opened up the field of cancer  
 25 detection that we were currently working on in 1992.

1135

1 Q. Nine.  
 2 I guess, did I cover eight?  
 3 A. Um-hmm.  
 4 Q. Yes.  
 5 A. Number nine is a paper on inherited P53 mutations in  
 6 patients with breast cancer in "Cancer Research," 1992.  
 7 Q. Ten.  
 8 A. It was a paper looking again at the various genetics  
 9 aspects of colorectal cancer, published in "Cancer" in  
 10 1992.  
 11 Q. Eleven.  
 12 A. It has to do with again the Ras oncogene in colon  
 13 cancer. That was published in "Cell Growth and  
 14 Differentiation" in 1993.  
 15 Q. Twelve?  
 16 A. This is a paper on P53 mutations in a specific type  
 17 of cancer called sarcomas. It was published in "Cancer  
 18 Research" in 1993.  
 19 Q. Thirteen.  
 20 A. This is a paper looking specifically at the number  
 21 and frequency of P53 mutations in head and neck cancer from  
 22 early lesions to full-blown cancer, published in "Cancer  
 23 Research" in 1993.  
 24 Q. Fourteen?  
 25 A. Fourteen was a paper looking at chromosomal

1136

1 deletions, chromosomal 9 deletions in bladder cancer in  
 2 1993.  
 3 Q. And this, this goes on and on. I mean, there's a  
 4 hundred -- there's 164 of them listed there that are  
 5 with -- from 159 to 164 being those that have been  
 6 submitted at this point, is that correct?  
 7 A. There's probably over 170 peer-reviewed publications  
 8 that I've published.  
 9 Q. And this has been a focus of your life, is that  
 10 correct?  
 11 A. For the last ten years, more or less.  
 12 Q. Maybe I really -- maybe we just pick up the  
 13 last -- we will skip, we could do it all, but if we can  
 14 just go to the year 2000 maybe and pick up again at 142, if  
 15 you would.  
 16 A. Okay. It's a paper on K-Ras mutations in cancer of  
 17 the biliary tract.  
 18 Q. What is that, please?  
 19 A. Biliary tract is the bile duct system in the liver.

20 Published in the year 2000.  
21 Next paper is on a new oncogene in head and  
22 neck cancer called NP11 published in "Cancer Research."  
23 Q. 144?  
24 A. Again this is on detection of HPV DNA which is a  
25 virus that can be associated with head and neck cancer,  
1137  
1 published in "Head and Neck Research," 2000.  
2 Q. 145?  
3 A. That is a paper on bladder cancer and the molecular  
4 progression to full-blown cancer, published in the  
5 "International Journal of Cancer."  
6 Q. 146?  
7 A. Is a paper on P40, which is a member of the P53  
8 family, looking at the protein in the blood of patients  
9 with respiratory tract cancers.  
10 Q. 147.  
11 A. 147 is a paper looking at APC which is a tumor  
12 suppressor gene in the blood of patients with esophageal  
13 cancer, published in the "Journal of the National Cancer  
14 Institute" this year -- 2000, I'm sorry.  
15 Q. 148?  
16 A. 148 is a paper on microsatellite instability -- the  
17 microsatellites are the markers we talked about here  
18 earlier -- in respiratory tract cancers, published in  
19 "International Journal of Cancer," 2000.  
20 Q. 149.  
21 A. 149 is looking at a P63 protein which again is part  
22 of the P53 family. This was published in the proceedings  
23 of the National Academy of Sciences in the year 2001.  
24 Q. 150.  
25 A. That is P16 methylation patterns. P16 is one of  
1138  
1 these tumor suppressor genes we talked about.  
2 THE COURT: Slow down, Doctor, please.  
3 A. P16 is one of the tumor suppressor genes we talked  
4 about earlier, "Cancer Research," 2001.  
5 Q. The next one.  
6 A. The next one is looking at microsatellite changes in  
7 saliva of patients with head and neck cancer, published in  
8 "Clinical Cancer Research," 2001.  
9 Q. The next one, please?  
10 A. The next one is the paper that we actually  
11 highlighted here, that is the paper entitled "Chromosomal  
12 Alterations in Lung Adenocarcinoma From Smokers and  
13 Nonsmokers." That was published in February of this year  
14 in "Cancer Research."  
15 Q. The next one?  
16 A. The next one is a paper on P16 again -- P16 is a  
17 tumor suppressor gene -- and its involvement in cancer  
18 progression, published in "Experimental Cell Research,"  
19 2001.  
20 Q. The next one?  
21 A. The next one deals with losses of chromosome 9P in  
22 smokers compared to nonsmokers, "Cancer Research," 2001.  
23 Q. 155?  
24 A. That paper deals with losses on chromosomal arms 3P  
25 and 9P in patients with lung cancer, 2001.  
1139  
1 Q. 156?  
2 A. 156 is a paper that deals with mitochondria  
3 mutations, kind of the power houses of cells in cancer,  
4 that is now actually in the midst of publication in "Cancer

5 Research."  
6 Q. The next one is 157?  
7 A. 157. That is the interaction of PTP9.5, potential  
8 activated gene in cancer, that has also been accepted for  
9 publication in 2001.  
10 Q. And the next one?  
11 A. Next one is a paper on patterns of P53 protein  
12 changes in tumors. Actually I think it's already been  
13 published this year in "Oncogene," 2001.  
14 Q. There's several under there that are submitted for  
15 publication, is that correct?  
16 A. Correct.  
17 Q. And I, frankly, think I have one page missing here of  
18 some others that are submitted?  
19 A. What's missing there are probably some book chapters.  
20 Q. Book chapters, and I'll try to locate them now.  
21 But give us some of the book chapters you  
22 have written, please, Dr. Sidransky.  
23 A. I've written several book chapters related to the  
24 genetics of cancer in general. I also, for example, have  
25 written a chapter in the textbook by Devita, D-E-V-I-T-A,  
1140  
1 which is one of the standard textbooks in medical oncology  
2 related to the treatment of cancer.  
3 Q. By coincidence, is this -- this is the fifth edition  
4 of that?  
5 A. That is the fifth edition of the Devita textbook.  
6 A chapter there on head and neck cancer.  
7 MR. COFER: Your Honor, defendants will  
8 stipulate Dr. Sidransky is an expert in molecular genetics  
9 and molecular biology.  
10 THE COURT: Well, the plaintiff has every  
11 right to demonstrate, to the extent they believe  
12 appropriate, the background of each expert. The clock is  
13 running. If plaintiff thinks that it's important to use  
14 his time in that fashion, he's entitled to do it.  
15 BY MR. SMITH:  
16 Q. Would you tell us some of the other book chapters  
17 you've written, please, Dr. Sidransky?  
18 A. I've written book chapters on the genetic molecular  
19 tests to detect cancers early, the way we are using them to  
20 screen tumors in blood and saliva and urine. There's about  
21 35 chapters that I wrote.  
22 Q. What are the advantages of being able to screen --  
23 the practical ramification advantages of being able to  
24 screen tumors early in this, coming from this type of work,  
25 is what?  
1141  
1 THE COURT: That's a statement, counselor.  
2 Ask him a question.  
3 Q. Would you tell us if there is a practical advantage  
4 in being able to detect tumors early?  
5 A. Well, I guess one of the reasons we do all this  
6 genetic work is to find genetic changes that are intricately  
7 associated with cancer so we can develop tests that could  
8 find cancers early.  
9 Finding cancers early is associated with a  
10 much higher chance of cure, a much higher chance of  
11 survival.  
12 Q. Dr. Sidransky, would you tell us whether or not you  
13 are being paid for the time and work that you've put into  
14 this case?  
15 A. I am not being paid. I've asked that a donation be

16 made instead to a charity of my choice.  
17 Q. And is it true that in August 20th of this year,  
18 there was a paper or there was a section of "Time" magazine  
19 wherein they reflected what certain scientists, I think it  
20 was seven or eight scientists from around the world insofar  
21 as their selection of America's best in science and  
22 medicine, is that true?  
23 A. That is true.  
24 Q. And they selected 18 people, is that true?  
25 A. That is true.

1142

1 Q. And were you one of those that have been selected?  
2 A. I was selected as America's best in oncology.  
3 MR. SMITH: Thank you. That's all I have,  
4 sir.  
5 THE COURT: We will take the midmorning  
6 recess.  
7 Thank you. You may file out.  
8 (Jury out).  
9 (Recess taken).

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CROSS - SIDRANSKY

1 THE COURT: You may cross examine.  
2 MR. COFER: Thank you, your Honor.  
3 CROSS EXAMINATION  
4 BY MR. COFER:  
5 Q Good morning. Members of the jury, Dr. Sidransky, I'm  
6 Walter Cofer.  
7 A Good morning.  
8 Q One thing I want to clear is up is your testimony  
9 about smoking tumors.  
10 If you look at hundred people who already have  
11 lung cancer, 90 percent of that hundred people are smokers,  
12 is that correct?  
13 A That's correct.  
14 Q 10 percent are non-smokers?  
15 A That is correct.  
16 Q But if you look at a hundred smokers, it is also true  
17 that 90 percent of smokers don't get lung cancer, right?  
18 A That is correct.  
19 Q The more you smoke, and the longer you smoke, the  
20 higher your risk of getting lung cancer from smoking, right?  
21 A I agree with that.  
22 Q When you quit smoking, your risk of lung cancer goes  
23 down?  
24 A Correct.  
25 Q The longer you quit, the more your risk drops?

## CROSS - SIDRANSKY

- 1 A That is correct.  
2 Q The earlier you quit the better?  
3 A The earlier you quit the more likely you are to enjoy  
4 a decrease in getting -- decrease in the chance of getting  
5 lung cancer, correct.  
6 Q Mr. Tompkin had the cell type adenocarcinoma, correct?  
7 A That is correct.  
8 Q When you see non-smokers with lung cancer, typically  
9 the cell type they have is adenocarcinoma, right?  
10 A Correct.  
11 Q Asbestos contributes to some cases of lung cancer in  
12 non-smokers?  
13 A Correct.  
14 Q The cause of lung cancer in the majority of  
15 non-smokers is unknown?  
16 A Correct.  
17 Q You were first contacted in this case in May of this  
18 year, correct, doctor?  
19 A Correct.  
20 Q You were contacted by Dr. Alan Feingold, right?  
21 A That is correct.  
22 Q Dr. Feingold is a pulmonologist in Miami, Florida?  
23 A That, correct.  
24 Q You met Dr. Feingold through Woody Wilner?  
25 A That's correct.

## CROSS - SIDRANSKY

- 1 Q Woody Wilner is a lawyer in Florida who sues tobacco  
2 companies, right?  
3 A That is correct.  
4 Q Dr. Feingold frequently testifies for Mr. Wilner,  
5 right?  
6 A I believe so.  
7 Q You have been retained and testified for Mr. Wilner?  
8 A Correct, once.  
9 Q Dr. Feingold asked you whether there was any test you  
10 could do which would tell whether Mr. Tompkin's cancer was  
11 caused by smoking, right?  
12 A That is correct.  
13 Q Dr. Feingold told you that Mr. Tompkin had smoked for  
14 around 15 pack years and had quit smoking for over 25 years,  
15 right?  
16 A That is correct.  
17 Q At the time you did your LOH testing, this was all of  
18 the information you had about Mr. Tompkin?  
19 A That is correct.  
20 Q You had no information about Mr. Tompkin's exposure to  
21 asbestos?  
22 A Correct.  
23 Q You did not know that an autopsy had been performed?  
24 A True.  
25 Q In fact, you are not sure whether you even knew that

## CROSS - SIDRANSKY

- 1 Mr. Tompkin was deceased?  
2 A At what time?  
3 Q At the time that you did your LOH testing?  
4 A Correct.  
5 Q You reviewed no medical records?  
6 A Correct.  
7 Q Other than the samples sent to you for testing, you

8 did not review any of the pathology of the case?  
9 A Just from a chronological point of view I did look at  
10 Dr. Tomashefski's autopsy reports.  
11 Q That was after you had already prepared your May 18th  
12 report?  
13 A Correct.  
14 Q In fact, I have a copy of the May 18th report; I have  
15 a blow up.  
16 This is plaintiff's Exhibit PT 001397.  
17 MR. COFER: May I show this to the witness.  
18 THE COURT: Yes.  
19 BY MR. SMITH:  
20 Q Is this an actual blow up of your report, doctor?  
21 A Yes, it is.  
22 MR. COFER: Can everyone see it okay?  
23 BY MR. COFER:  
24 Q At the time that you prepared your report. You did  
25 not know that P53 testing had been conducted on

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CROSS - SIDRANSKY

1 Mr. Tompkin's lung tissue, had you?  
2 A Correct.  
3 Q You did not know that K-ras testing had been done on  
4 Mr. Tompkin's lung cancer, did you?  
5 A Correct.  
6 Q None of this information had been provided to you at  
7 the time you prepared your report?  
8 A That is correct.  
9 Q And you did not rely on any of this information for  
10 the opinions that you expressed in your report, correct?  
11 A That is correct.  
12 Q Now Dr. Guo, did I pronounce that correctly?  
13 A Close enough.  
14 Q Dr. Guo, G-u-o, is a post-doc in your lab?  
15 A Right.  
16 Q Under your direction, Dr. Guo performed some molecular  
17 testing on Mr. Tompkin's testing, is that right?  
18 A That is correct, right.  
19 Q What is known as LOH analysis?  
20 A Right.  
21 Q And LOH stands for loss of heterozygosity, correct.  
22 Could you spell that for the reporter?  
23 A H-E-T-E-R-O-Z-Y-G-O-S-I-T-Y.  
24 BY MR. COFER:  
25 Q Based on that testing you wrote your May 18th report

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CROSS - SIDRANSKY

1 and concluded quote, these results confirm that carcinogens  
2 in cigarette smoke are the cause of Mr. Tompkin's lung  
3 cancer, correct?  
4 A Correct.  
5 Q When you use the word confirm in your report, you  
6 don't mean that you're testing confirms or corroborates  
7 other information, do you?  
8 A No.  
9 Q You mean that based on your testing alone there is a  
10 very high probability that smoking caused Mr. Tompkin's lung  
11 cancer, right?  
12 A I would agree with that.  
13 Q Now in your report, you cite one scientific article,  
14 isn't that true?  
15 A That is true.  
16 Q And that is the article that you wrote in February,

17 2001 of this year, right?  
18 A That is correct.  
19 Q It's entitled chromosomal alterations and lung  
20 adenocarcinoma from smokers and non-smokers, right?  
21 A That is true.  
22 Q And this article reports the results of a study that  
23 you did last year, right?  
24 A True.  
25 Q And you went through that for the jury in response to  
1149

CROSS - SIDRANSKY

1 Mr. Smith's?  
2 A Could you repeat that generally.  
3 Q Generally you described what you did in that  
4 February 2001 report earlier in response to Mr. Smith's  
5 questions?  
6 A That is true.  
7 Q And just so it's clear, Dr. Sidransky, your opinions  
8 in this case are based almost exclusively on the LOH testing  
9 you did on Mr. Tompkin's tissue, which is described in your  
10 May 18th report, right?  
11 A That is true.  
12 Q Now, you have been retained by plaintiffs in a number  
13 of other tobacco cases; about 8 or 9, is that right?  
14 A That is correct.  
15 Q In each of those cases, you expressed the opinion that  
16 smoking caused the plaintiff's cancer, right?  
17 A That is correct.  
18 Q You did not perform an LOH analysis in any of those  
19 prior cases, did you?  
20 A Correct.  
21 Q You did not rely on the results of an LOH analysis in  
22 any of those prior cases, right?  
23 A That is correct.  
24 Q Now, in the past, when you've expressed opinions about  
25 the cause of someone's lung cancer, you have considered two  
1150

CROSS - SIDRANSKY

1 issues, the epidemiology, and the biology, right?  
2 A That is correct.  
3 Q The epidemiologic studies serve as a basis for  
4 determining relative risks, and that's a very important  
5 place to start, correct, doctor?  
6 A Epidemiology is very important. Epidemiology was the  
7 first to describe the association between smoking and lung  
8 cancer, and it's allows us to look at relative risk, what's  
9 the likelihood that a particular patient's tumor is due to  
10 smoking or not smoking.  
11 Q And you would agree that is a very important place to  
12 start, correct, doctor?  
13 A It's a very important component of making a decision  
14 whether somebody's cancer is due to smoking or not smoking,  
15 yes.  
16 Q And in considering the epidemiology, a very important  
17 fact would be the number of pack years a person smoked,  
18 right?  
19 A True.  
20 Q Also, the number of years a person had gone without  
21 smoking?  
22 A Correct.  
23 Q But again, in this case, your opinion is not based on  
24 epidemiology, it is based on your LOH testing and your  
25 understanding of the literature regarding molecular changes,



## CROSS - SIDRANSKY

1 right?

2 A I agree with that.

3 Q In fact, for your opinions that you have given the  
4 jury today, you don't need to know how much Mr. Tompkin  
5 smoked, how long he smoked, or how long it has been since he  
6 quit smoking, correct, doctor?

7 A That is correct.

8 Q Now, it's true, isn't it Dr. Sidransky, that a little  
9 over a year ago, in August of 2000, it was your opinion that  
10 it was not scientifically possible to run any tests or  
11 procedure to determine what caused a specific person's lung  
12 cancer, correct?

13 A Well, I would have to say that is correct, with a  
14 caveat. If I remember correctly, at that time you asked me  
15 whether there was a single test that was possible. And I  
16 said no. And I said we were working on a test that might be  
17 able to do it in the future. And since then there has also  
18 been 2 or 3 articles that were published, including our own,  
19 to further support in this particular test to identify the  
20 cause of somebody's cancer.

21 Q I'm going to repeat my question and I want you to  
22 listen specifically to my question and, if you would,  
23 please, doctor, answer the specific question, all right?

24 MR. SMITH: I object.

25 THE COURT: Well, I think he already answered

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## CROSS - SIDRANSKY

1 it, but if you want to ask it again go ahead.

2 BY MR. COFER:

3 Q It is true, isn't it, Dr. Sidransky, that a little  
4 over a year ago, in August of 2000, it was your opinion that  
5 it was not scientifically possible to run any test or  
6 procedure to determine what caused a specific person's lung  
7 cancer, isn't that true?

8 A That was my answer one year ago, correct.

9 Q You believe that science was starting to develop  
10 information that will one day help us do that, right?

11 A I agree with that.

12 Q And that maybe one day science would progress so that  
13 you could, more probably than not, be able to identify the  
14 cause of a person's cancer, right?

15 A Correct.

16 Q And again that was your view of the state of science  
17 in August of 2000?

18 A Correct.

19 Q By May 18th of this year, nine months later, you  
20 changed your mind, right?

21 A Well, I think that it's not changing my mind because,  
22 as I said earlier, I already said we were in the process of  
23 developing these tests; and yes, by May I felt we had enough  
24 information to do these specific tests and come up with the  
25 specific probability of the patient's probability of being

1153

## CROSS - SIDRANSKY

1 due to smoking or nonsmoking.

2 Q Today is the first time you have ever testified in a  
3 court of law that you can determine the cause of an  
4 individual's cancer based on your LOH testing, isn't that  
5 correct, sir?

6 A That is correct.

7 Q To your knowledge, no one, anytime, anywhere, has

8 testified in a court of law that someone's cancer was caused  
9 by cigarette smoking based on an LOH analysis, isn't that  
10 true, Dr. Sidransky?  
11 A To my knowledge, that is true.  
12 Q Let's talk about your February 2001 cancer research  
13 article, the one that's cited in your report, all right?  
14 A Okay.  
15 THE COURT: Do you want to keep this up here on  
16 the board or not?  
17 MR. COFER: I would like to keep it up, if  
18 that's okay.  
19 THE COURT: It's distracting to the jury, if  
20 you are going to ask him a whole bunch of questions  
21 not to do with that.  
22 MR. COFER: I'll take it down and put it back  
23 up.  
24 THE COURT: The problem with displaying  
25 something like that, the jury thinks it is supposed to  
1154

CROSS - SIDRANSKY  
1 be reading it while you are asking questions. So put  
2 it down, please.  
3 MR. COFER: All right. And of course this is  
4 the board the plaintiff put up, and I want to leave it  
5 up because I want to talk to you about it. Let me put  
6 it over here so nobody is distracted by it.  
7 Dr. Sidransky, I'm going to write on that  
8 easel this is plaintiff's chart and this is ours.  
9 BY MR. COFER:  
10 Q Can you read that? It is supposed to say February,  
11 2001 study?  
12 A I can read it.  
13 Q Okay. Now you used the word hypothesis in your direct  
14 examination. Can we call it -- let me ask you this.  
15 It is your premise or hypothesis that smoking  
16 causes LOH or loss of heterozygosity?  
17 A Correct.  
18 Q So smoking causes LOH; and second, that LOH leads to  
19 lung cancer, right?  
20 A That is correct.  
21 Q Can you read that and see that okay?  
22 Okay. Now, what you did in your February, 2001  
23 study, you looked at 45 people with adenocarcinoma, right?  
24 A That is correct.  
25 Q Mr. Tompkin had adenocarcinoma, right?  
1155

CROSS - SIDRANSKY  
1 A That is correct.  
2 Q But, of course, Mr. Tompkin was not in your study,  
3 right?  
4 A That is correct.  
5 Q 27 of these people were smokers, right?  
6 A Correct. Current or former smokers, yes.  
7 Q And 18 were non-smokers?  
8 A Right.  
9 Q And what you did was you did a micro satellite  
10 analysis looking for LOH, right?  
11 A That is true.  
12 Q You looked at 28 chromosomal arms?  
13 A There is a number of 54 markers and 28 arms, correct.  
14 Q Okay. So.  
15 Can everyone see that?  
16 So you looked at 28 chromosomal arms and 54

17 markers for your study, right?  
18 A Correct.  
19 Q You were looking for loss of heterozygosity, right?  
20 A That is true.  
21 Q And what you did is you compared the number and  
22 frequency of the losses that the smokers had with the number  
23 and frequency of the losses that the nonsmokers had?  
24 A Correct.  
25 Q And this chart, in fact, represents that, right?

1156

CROSS - SIDRANSKY

1 A That is true.  
2 Q Blue shows the losses smokers had at specific  
3 chromosomal arms, right?  
4 A Yes.  
5 Q And the red shows the loss that nonsmokers had at  
6 various individual chromosomal arms, right?  
7 A Correct.  
8 Q And when you look at that, what you find is, with a  
9 few exceptions, smokers tend to have a higher percentage of  
10 losses than nonsmokers, correct?  
11 A Correct.  
12 Q Now, you mentioned these are put in order of the most  
13 frequent losses to, I guess, the fewest losses, right?  
14 A Correct.  
15 Q And if you look at 9P for the smokers, that's the arm  
16 that had the most losses, right?  
17 A Correct.  
18 Q In fact, 65 percent of smokers had a loss or an  
19 alteration at 9P, right?  
20 A Correct.  
21 Q 35 percent of smokers did not have an alteration at  
22 9P?  
23 A Correct.  
24 Q On 19P, the second one, 58 percent of smokers had a  
25 loss, right?

1157

CROSS - SIDRANSKY

1 A Correct.  
2 Q 42 percent of smokers did not have a loss?  
3 A Correct.  
4 Q And once you get past 9P and 19P, less than 50 percent  
5 of smokers had those specific losses, right?  
6 A Correct.  
7 Q So once you get past 19P, it's more likely that a  
8 smoker won't have a loss than that he will have a loss?  
9 A For that particular chromosomal arm, right.  
10 Q That's exactly right. Thank you, for the individual  
11 arm.  
12 And when you get to 5Q, which is about the  
13 mid-point, 30 percent of smokers had those losses, right?  
14 A Right.  
15 Q So 70 percent did not?  
16 A Correct.  
17 Q It was over, it's over twice as likely, according to  
18 your study, that from 5Q and everything to the right it's  
19 more than twice as likely that a smoker won't have a loss,  
20 right?  
21 A Correct.  
22 Q Yet everyone in your study, whether they had a loss,  
23 had adenocarcinoma, correct?  
24 A Correct.  
25 Q Just like Mr. Tompkin had adenocarcinoma, correct?

CROSS - SIDRANSKY

1 A Right.  
2 Q Now it's true, isn't it, Dr. Sidransky, that your  
3 study is the first study ever to look at all of these  
4 chromosomal arms and make this analysis, correct?  
5 A It's the first study to look at the entire range of  
6 all the chromosomal arms, yes.  
7 Q Your study has not been repeated or replicated, has  
8 it?  
9 A Not for all the chromosomal arms, but there have been  
10 repeated studies that several of these chromosomal arms have  
11 been done.  
12 Q You want it to be repeated, don't you?  
13 A Yes.  
14 Q You want it to be expanded to other populations, don't  
15 you?  
16 A Yes.  
17 Q In other words, you want your study repeated looking  
18 at different types of people to confirm that your hypothesis  
19 and your conclusions are valid, correct?  
20 A Correct.  
21 Q What you are hoping for is we'll get more data which  
22 will confirm the results of this study, isn't that true?  
23 A That is true; and particularly for the other  
24 chromosomal arms that we mentioned for the first time in  
25 this study.

1159

CROSS - SIDRANSKY

1 Q Now again, everyone in the study had adenocarcinoma?  
2 A Correct.  
3 Q You had 27 smokers and 18 nonsmokers, right?  
4 A Correct.  
5 Q Can we agree that their smoking did not cause the  
6 nonsmokers' lung cancer?  
7 A I hope so.  
8 Q They didn't smoke, so obviously their smoking didn't  
9 cause it, right?  
10 A Correct.  
11 Q Now in your study, you did not try to determine what  
12 caused the nonsmokers lung cancer, did you?  
13 A You mean from a risk point of view? Other factors  
14 other than smoking, is that what you are asking?  
15 Q Correct.  
16 A That's correct. We basically stratify the patients  
17 based on smoking.  
18 Q Let's talk about the 27 smokers.  
19 Was smoking the cause of all 27 of the smokers'  
20 lung cancer?  
21 A Well, it was the caused based on epidemiology, it was  
22 the cause of at least 90 percent of those, yes.  
23 Q How about based on your study, your study alone, can  
24 you conclude that smoking caused all 27 of those smokers  
25 lung cancer?

1160

CROSS - SIDRANSKY

1 A Well, the study was not done perspectivevely, the study  
2 was done on tumor samples from patients that smoked or  
3 didn't smoke. All we can look at is the comparison of those  
4 two groups.  
5 Q It is true, isn't it, with respect to 9 of the 45  
6 patients in the study, they had no LOH at all?  
7 A Correct.

8 Q So on 45 people to study, 9 of them had no LOH, none  
9 of those alterations at all, right?  
10 A That is correct, that is correct.  
11 Q And they all had adenocarcinoma?  
12 A Correct.  
13 Q Nine, that would be one-fifth or 20 percent of the  
14 people in your study had adenocarcinoma just like  
15 Mr. Tompkin and had no LOH?  
16 A Correct.  
17 Q So one thing we do know is, you can have no losses at  
18 all and get adenocarcinoma, right?  
19 A Correct.  
20 Q Now, you told us in your study you looked at 28  
21 chromosomal arms and 54 micro satellite markers, right?  
22 A Right.  
23 Q But you did not do that for Mr. Tompkin, did you?  
24 A Correct.  
25 Q For Mr. Tompkin you looked at 4 chromosomal arms,  
1161

CROSS - SIDRANSKY

1 right?  
2 A Correct.  
3 Q And you looked at 8 micro satellite markers, right?  
4 A Correct.  
5 Q And the results of what you found is on page 7 of Dr.  
6 Guo's handwritten notes, correct?  
7 A Right.  
8 Q And for record, that's Plaintiff's Exhibit T 001399,  
9 and I have a blow up of page 7 of his notes.  
10 Can you see it okay, doctor?  
11 A More or less.  
12 MR. COFER: Your Honor, the notes are also  
13 appended to the materials I gave you earlier.  
14 Q Well, let's look at that because it is kind of hard  
15 for the jury to read. It says results and interpretation,  
16 right?  
17 A Yes.  
18 Q And down here it says LOH recorded at, correct?  
19 A Yes.  
20 Q And it lists some location, right?  
21 A Yes.  
22 Q And then it says, retention at?  
23 A Yes.  
24 Q And it lists some locations, correct?  
25 A Correct.

1162

CROSS - SIDRANSKY

1 Q And then it says, no amplification at, and then has  
2 one location, right?  
3 A Correct.  
4 Q Okay.  
5 As I see it, what happened is you looked at  
6 three different micro satellite markers on 3 people, right?  
7 A Correct.  
8 Q You looked at this one, this one, and this one, right?  
9 A Correct.  
10 Q And what your results showed was, there was a loss at  
11 1 micro satellite marker at 3P, right?  
12 A Correct.  
13 Q D 3 S 1067.  
14 A Correct.  
15 Q And there was no loss at the other two micro satellite  
16 markers on 3P, right?

17 A Correct.  
18 Q So there was retention or no loss at D 3 S 1200,  
19 right?  
20 A Yes.  
21 Q And D 3 S 4103, correct?  
22 A Correct.  
23 Q Now earlier I think you told the jury that science  
24 doesn't yet know the target gene for 3P, right?  
25 A That is correct.

1163

CROSS - SIDRANSKY

1 Q So what we have is, we looked at 3P, we found one loss  
2 and two with no loss, correct?  
3 A Correct.  
4 Q Now we looked at 9P and we found two losses?  
5 A Correct.  
6 Q We looked at two micro satellite markers and we found  
7 two losses?  
8 A Right.  
9 Q Losses at D9S171 and interferon?  
10 A Interferon A, yes.  
11 Q The next thing you looked at was 17P, correct?  
12 A Right.  
13 Q 17P is not mentioned in your report, is it?  
14 A Correct.  
15 Q Because in your report you only listed the markers  
16 where you found a loss or a change, right?  
17 A Correct.  
18 Q 17P is near the P53 gene, right?  
19 A P53 is on chromosomal arm 17P.  
20 Q And you looked at T P53?  
21 A Which is a marker close to P53, right.  
22 Q And when Mr. Smith was going through the articles that  
23 you wrote, I think if first 9 articles that you published  
24 that Mr. Smith read were on the P53 gene, right?  
25 A Right.

1164

CROSS - SIDRANSKY

1 Q And this you found no LOH at P53, right?  
2 A Correct.  
3 Q Then you looked at P19, or 19P, right?  
4 A Correct.  
5 Q And what you found was, you found LOH at 1 site, D 19  
6 S 411 at P19, right?  
7 A Correct.  
8 Q And the other one didn't work, correct?  
9 A Correct.  
10 Q So just to summarize.  
11 Can you see that Dr. Sidransky?  
12 A Yes.  
13 Q So to summarize. 3P you were one for three; 9P two  
14 for two; 17P 0 for one; 19P, one for two, right?  
15 A It is really one for one, there is no information on  
16 the one that didn't work.  
17 Q It didn't work so we don't know what it would have  
18 shown, correct?  
19 A Right.  
20 Q I think you told us that 3P, 9P, 17P, had been  
21 examined in the literature for quite some time, right?  
22 A Correct.  
23 Q You added 19P based on the result of your February,  
24 2001 study, right?  
25 A Correct.

## CROSS - SIDRANSKY

- 1 Q So basically, 4 of the 8 micro satellite markers you  
2 tested showed these losses, right?
- 3 A Correct.
- 4 Q Based on that testing, your understanding of the  
5 literature alone, you have given your opinion to the jury  
6 that cigarette smoking was the cause of Mr. Tompkin's lung  
7 cancer, right?
- 8 A Right.
- 9 Q You don't know, do you Dr. Sidransky, what carcinogen  
10 caused any of those specific losses?
- 11 A Correct.
- 12 Q You do not know, do you, Dr. Sidransky, when any of  
13 those specific losses occurred?
- 14 A No, other than to say that losses on 3P and 9P  
15 generally occur earlier rather than later, but I don't know  
16 exactly when they occurred, no.
- 17 Q Let me show you a summary of Mr. Tompkin's smoking  
18 history representative chart. It shows what brands he  
19 smoked and when he smoked them. Are you familiar with this  
20 information, doctor?
- 21 A Yes.
- 22 Q It's true, isn't it, sir, that you cannot tell this  
23 jury that the four to six Old Gold cigarettes that  
24 Mr. Tompkin smoked caused any of these losses, correct?
- 25 A That is correct.

## CROSS - SIDRANSKY

- 1 Q It is true, isn't it, sir, that you cannot tell this  
2 jury that the Philip Morris brand cigarettes Mr. Tompkin  
3 smoked caused any of these losses?
- 4 A No, I can't distinguish between any of the cigarettes  
5 he had.
- 6 Q Let's go ahead and just make the record.
- 7 A Okay.
- 8 Q It is true, isn't it, Dr. Sidransky, that you cannot  
9 tell this jury that the Pall Mall cigarettes Mr. Tompkin  
10 smoked caused any of these losses?
- 11 A That is correct.
- 12 Q It is true, isn't it, Dr. Sidransky, that you cannot  
13 tell this jury that the Chesterfield cigarettes Mr. Tompkin  
14 smoked caused any of these losses?
- 15 A Again, that is true.
- 16 Q It is true, isn't it doctor, Sidransky, that you  
17 cannot tell the this jury that the Tareyton cigarettes  
18 Mr. Tompkin smoked caused any of these losses?
- 19 A That is correct.
- 20 Q It is true, isn't it, Dr. Sidransky, that you cannot  
21 tell this jury that the Kent cigarettes Mr. Tompkin smoked  
22 caused any of these losses?
- 23 A That is correct.
- 24 Q And finally, doctor, it is true that you cannot tell  
25 this jury that any of the Lark cigarettes Mr. Tompkin smoked

## CROSS - SIDRANSKY

- 1 caused any of these losses, right?
- 2 A That is correct.
- 3 Q The fact is, there is absolutely no way, under current  
4 science to determine which cigarettes caused Mr. Tompkin's  
5 LOH and when the LOH occurred, right?
- 6 A That is correct, it could be the first puff or the  
7 last or anything in-between.

8 Q Okay. Thank you.  
9 Did you tell the jury that you were 99 percent  
10 sure that those losses caused Mr. Tompkin's lung cancer?  
11 A That is correct. What I stated is that pattern of  
12 losses. There is a 99 percent probability it would occur in  
13 this smoking pattern versus a nonsmoking pattern.  
14 Q And what you did, first of all, you said these losses  
15 at 9P, 3P and 19P are independent events, right?  
16 A Correct.  
17 Q And what that means is, one thing didn't knock a  
18 couple of them out?  
19 A Correct.  
20 Q Different things knocked different ones of them out at  
21 different points in time, right?  
22 A Correct.  
23 Q And based on that, you said, okay, it's really simple  
24 math, you just multiply the chances of a nonsmoker having a  
25 loss at 9P?

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CROSS - SIDRANSKY

1 A Correct.  
2 Q Times the chance of a nonsmoker having a loss at 3P?  
3 A Correct.  
4 Q Times a chance of a nonsmokers having a loss at 19P?  
5 A Correct.  
6 Q You come up point 0015 and then you subtract it from a  
7 hundred, right?  
8 A Right.  
9 Q Because if it is not a nonsmoking tumor, it is a  
10 smoking tumor, right?  
11 A Right.  
12 Q Mr. Tompkin was not in your study, right?  
13 A Right.  
14 Q But had he been in your study you would have  
15 classified him as a smoker, right?  
16 A Correct.  
17 Q And you have data in your study for the likelihood of  
18 a smoker having those losses, correct?  
19 A Correct.  
20 Q If we do the math it should come out to be 99 percent,  
21 right?  
22 A It won't come out to be 99 percent.  
23 Q Let's see what it will. The LOH at 3P, LOH at 3P,  
24 these are the odds of a smoker having these losses, right?  
25 A Having, yes.

1169

CROSS - SIDRANSKY

1 MR. SMITH: Do you mind writing on yours,  
2 please.  
3 MR. COFER: Okay.  
4 MR. SMITH: I'll give you the same courtesy,  
5 Walt.  
6 MR. COFER: Okay.  
7 Q Odds of a smoker having these losses, okay?  
8 A Correct.  
9 Q 3P is 37 percent, right?  
10 A Correct.  
11 Q 9P is 65 percent?  
12 A Correct.  
13 Q 19P is?  
14 A 58 percent.  
15 Q 58 percent, thank you.  
16 And when you multiply these together you know



17     what you come up with don't you?  
18     A       Probably 13 to 15 percent.  
19     Q       I have 13.090. 14 percent?  
20     A       Round it off to 14 percent, right.  
21     Q       Can we agree 14 percent does not equal 99 percent?  
22     A       Correct.  
23     Q       And if you subtract 14 from a hundred, it's  
24     86 percent, right?  
25     A       Correct.

1170

CROSS - SIDRANSKY

1     Q       Using your reasoning, it is 86 percent likely that  
2     these were not the result of smoking, correct?  
3     A       No, what -- using the reasoning here is that there is  
4     a 14 percent chance that these three changes would occur at  
5     the same time in a particular patient's tumor. And since  
6     each loss is essentially less than 100 percent and obviously  
7     any other combination of losses is going to be less than a  
8     hundred percent. But the comparison really has to be done  
9     between the pattern in smokers versus nonsmokers.  
10    Q       What you told the jury on direct examination, which I  
11    thought was really pretty clear. You took the odds of a  
12    nonsmoker having a loss at 9P, you multiplied it by the odds  
13    of a smoker having a loss at 3P, you multiplied it by the  
14    odds of a nonsmoker having a loss at 19P, you came up with  
15    point 0015. You subtracted it from a hundred, you told the  
16    jury it was 99 percent likely, then, this was a smoking  
17    related tumor, right?  
18    A       Correct.  
19    Q       You had the data for smokers, too, right?  
20    A       Correct.  
21    Q       Under your study, Mr. Tompkin would be classified as a  
22    smoker, right?  
23    A       Correct.  
24    Q       It's true, isn't it, Dr. Sidransky, that a person can  
25    have losses at 3P, 9P, and 19P, and not get lung cancer?

1171

CROSS - SIDRANSKY

1     A       That is correct.  
2     Q       I think we've already established that it is also true  
3     a person can have none of these losses and get lung cancer?  
4     A       That is true.  
5     Q       Included in your study were two or three or four  
6     former smokers, correct?  
7     A       Correct.  
8     Q       For purposes of your analysis you lumped them in with  
9     current smokers, right?  
10    A       Correct.  
11    Q       Most of the smokers in your study were heavy smokers,  
12    right?  
13    A       That is correct, most of them had more than 40 pack  
14    years.  
15    Q       That was also true of the former smokers?  
16    A       That is correct.  
17    Q       And most had more than 40 pack years of smoking?  
18    A       That's correct.  
19    Q       The former smokers were recent quitters, weren't they?  
20    A       For the most part they quit in the last few years,  
21    correct, before the cancer developed.  
22    Q       I apologize for cutting you off.  
23            There was no one in your study with a smoking  
24    profile like Mr. Tompkin who smoked for 15 years, stopped  
25    for 25 years without cancer, correct, doctor?

## CROSS - SIDRANSKY

1 A Correct.  
 2 Q That's a very rare occurrence, isn't it doctor?  
 3 A Yes, it is.  
 4 Q With Mr. Tompkin, you have a person who has about a 15  
 5 pack year history, right?  
 6 A Correct.  
 7 Q He stopped smoking cold turkey in 1965 and never  
 8 smoked again, right?  
 9 A That is my understanding.  
 10 Q He went 27 years between the time of his last  
 11 cigarette and when he was diagnosed with lung cancer,  
 12 correct?  
 13 A That is correct.  
 14 Q Over 30 years passed between his last cigarette and  
 15 when he died of lung cancer, right?  
 16 A That is correct.  
 17 Q So if you look at the epidemiologic data, what you are  
 18 saying is Mr. Tompkin's risk is really, really, really  
 19 getting low, right?  
 20 A I think you would have to defined what really, really,  
 21 really low is and I'll agree or disagree with you.  
 22 Q That's fair enough. It is getting close to baseline  
 23 it is getting close to that of a nonsmoker, correct?  
 24 A I still believe it would be slightly elevated, but it  
 25 is getting close to baseline, that is true.

1173

## CROSS - SIDRANSKY

1 Q Now asbestos contributes to some cases of lung cancer  
 2 in nonsmokers, right?  
 3 A That is correct.  
 4 Q In your study you did not investigate asbestos at all,  
 5 did you?  
 6 A Correct.  
 7 Q No one has done the type of LOH analysis with respect  
 8 to asbestos that you did with cigarettes, correct?  
 9 A Correct.  
 10 Q And in your May 18th report -- in your May 18th  
 11 report, you express no opinion whatsoever of the role of  
 12 asbestos and, in this case, cancer, do you, Dr. Sidransky?  
 13 A That is correct, I did not.  
 14 MR. COFER: That's all I have at this time,  
 15 thank you, your Honor.

- - -

## CROSS EXAMINATION

18 BY MR. McLAUGHLIN:  
 19 Q Good morning ladies and gentlemen.  
 20 Dr. Sidransky, good morning.  
 21 A Good morning.  
 22 Q I just have a couple questions.  
 23 In your article published in on February the  
 24 15th of 2001, the article which stands as the foundation  
 25 for the analysis you've given and the testimony you have

1174

## CROSS - SIDRANSKY

1 given here today. Entitled Chromosomal Alterations in Lung  
 2 Adenocarcinoma From Smokers and Nonsmokers, that's the  
 3 article, right, sir?  
 4 A Correct.  
 5 Q Now doctor, I see that you had a bio statistician also  
 6 as a co-author of this?  
 7 A That is correct.

8 Q Aside from yourself, there were what, 6 or 7 other  
9 coauthors?  
10 A Right.  
11 Q Now, what was the role of the bio statistician in the  
12 preparation of this article, sir?  
13 A Well, it was basically to look at the way the data  
14 analysis is done and to confirm the use of the specific  
15 calculations and the numbers and to list them for each  
16 chromosomal arm.  
17 Q Is that common practice for a bio statistician or  
18 epidemiologist to be involved in a study such as this?  
19 A It should be more common practice, I think that they  
20 should be involved; not always but often.  
21 Q Certainly they are with you, sir?  
22 A Yes.  
23 Q Now I note that in your article you talk about, or  
24 your bio statistician talks about the 95 percent confidence  
25 interval?

1175

CROSS - SIDRANSKY

1 A Correct.  
2 Q And what is that, sir?  
3 A Well, 95 confidence interval is likely seeing how  
4 likely the number you are particularly citing is likely to  
5 be real; that is which is the boundaries you can interpret  
6 that number to be real. And they are important to give you  
7 a sense of whether that number is likely to be producible or  
8 not.  
9 Q And that's the standard, the 95 percent confidence  
10 interval is the standard you used in this publication and  
11 other of your publications?  
12 A That's a very common standard any time you give a  
13 value to give a confidence interval.  
14 MR. COFER: Thank you, sir.

- - -

CROSS EXAMINATION

17 BY MR. MILLIMAN:  
18 Q Good morning, doctor, how are you?  
19 A Good morning.  
20 Q My name is Jim Milliman and I represent the American  
21 Tobacco Company?  
22 A Okay.  
23 Q I believe I met you briefly in Baltimore for your  
24 deposition also.  
25 A Yes, I remember.

1176

CROSS - SIDRANSKY

1 Q Doctor, I'm going to try not to cover any ground that  
2 Mr. Cofer covered, and if I do touch on it, please tell me  
3 and I'll try to back off of it.  
4 A Okay.  
5 Q There will be one area I will ask you about your  
6 multiplication. I want to expound on what Mr. Cofer did,  
7 okay? But any other area just tell me you've answered it  
8 and we'll move on.  
9 A Okay.  
10 Q Doctor, Mr. Cofer did talk to you about asbestos  
11 exposure, correct?  
12 A Correct.  
13 Q But did your study, your survey and your paper, take  
14 into account occupational exposure to things like silica?  
15 A No.  
16 Q Doctor, you have not investigated the role of

17 excessive alcohol consumption on chromosomal abnormalities,  
18 have you?  
19 A We have not published on it but we've looked at it,  
20 yes.  
21 Q And are you aware of any literature on alcohol and  
22 chromosomal deletions?  
23 A Not specifically at this time, no.  
24 Q And you had data on alcohol consumption of the  
25 patients used in your study, didn't you?

1177

CROSS - SIDRANSKY

1 A Correct.  
2 Q In fact, 60 percent of the John Hopkins patients had a  
3 history of alcohol consumption, correct?  
4 A Correct.  
5 Q And do you know whether any of those patients had a  
6 history of alcohol abuse?  
7 A It would be in our data files, but I don't know  
8 offhand.  
9 Q But you never referred to the effects of alcohol in  
10 your study, correct?  
11 A Correct.  
12 Q And you never tested specifically whether alcohol  
13 could be responsible for the deletions, did you?  
14 A We never considered it as a factor, that is correct.  
15 Q And you had no data as to how long Mr. Tompkin, by his  
16 admission, used alcohol, correct?  
17 A Correct.  
18 Q You do know that he testified that he binged for a  
19 while, by his own testimony.  
20 A I'm not aware of that.  
21 Q You can't tell us whether alcohol contributed to the  
22 chromosomal deletions in Mr. Tompkin, can you?  
23 A I cannot.  
24 Q And you do know that alcohol is a risk factor of  
25 cancer, correct?

1178

CROSS - SIDRANSKY

1 A Correct.  
2 Q In fact, one who consumes 12 beers a month has an  
3 elevated risk of cancer, are you aware of that, sir?  
4 A It depends what types of cancers you are talking  
5 about.  
6 MR. SMITH: Excuse me one second.  
7 BY MR. MILLIMAN:  
8 Q Doctor, are you -- let's talk about lung cancer?  
9 A Okay.  
10 Q And are you aware that is there an elevated risk of  
11 lung cancer from one who consumes alcohol at the rate of 12  
12 beers a month?  
13 A I think it is debatable in the literature. There are  
14 certainly studies that says there is or isn't. I actually  
15 believe there is a contribution from alcohol.  
16 Q You say there probably is?  
17 A Yes, correct.  
18 Q Do you know what level that is, that would be?  
19 A Depends on how much you are drinking and how long.  
20 Q Are you aware of a gentleman named Elisa Bandera?  
21 A No.  
22 MR. MILLIMAN: May I approach and show the  
23 witness a document.  
24 Q Doctor, I've shown you an article by Bandera and  
25 others, and can you identify that article?

CROSS - SIDRANSKY

1 A Yes. The article is entitled Alcohol Consumption and  
2 Lung Cancer in White Males. It is in Cancer Causes and  
3 Control and it was published in 1992.

4 Q And are you familiar with the authors of this article?

5 A Greg Wilkinson is a familiar name to me, yes.

6 Q Would you say the article that was published in the  
7 cancer cases in control would be an authoritative article?

8 A I don't consider any single article to be absolutely  
9 authoritative; it has to be taken in the context of other  
10 articles. But I think that just quickly scanning the  
11 abstract it is compatible with other pieces of literature.

12 Q And in the abstract, in the beginning, I believe he  
13 says in this group, "the odds ratio for drinkers of more  
14 than 24 drinks per month was 1.6 with compared to those who  
15 drank less, the drinkers with 12 --"

16 THE COURT: I asked you to read slowly. I  
17 don't know why anybody can't keep up with that  
18 recommendation. The court reporters are good,  
19 they are working under great stress. You want the  
20 report each night of what's happened during the day,  
21 they are doing their best to do that for you, but you  
22 have to take into consideration their problem. Now,  
23 they can not take down testimony at the speed of  
24 light. Please slow down.

25 And I say that to everybody, the witnesses

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CROSS - SIDRANSKY

1 and the lawyers.

2 MR. MILLIMAN: I apologize.

3 THE COURT: There is another problem, too. The  
4 as faster you go the less likely the jurors are going  
5 to get it. The jurors are the ones you are trying to  
6 convince, and if you read so fast they can't pick up  
7 what you are saying or can't synthesize it, so their  
8 credibility determinations, you might as well talk out  
9 the window as here in the courtroom.

10 Please slow down. Now start over again.

11 BY MR. MILLIMAN:

12 Q In this group, the odds ratio --

13 THE COURT: Now, you are reading from the  
14 article?

15 MR. MILLIMAN: Yes, your Honor.

16 THE COURT: And you are going to ask him  
17 whether he considered that?

18 MR. MILLIMAN: Yes, your Honor.

19 THE COURT: I'm going to tell the jury that the  
20 fact they read an article into the record doesn't mean  
21 that you accept it as true. That's gone on through  
22 the lawsuit, these people who have written the  
23 articles are not under oath and subject to cross  
24 examination, but we allow people who are qualified as  
25 experts to take into consideration what's been said by

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CROSS - SIDRANSKY

1 other people in the field, and they are free to accept  
2 it or reject it in their capacity as an expert  
3 witness, as this person is an expert witness.

4 Now please proceed.

5 MR. MILLIMAN: Thank you, your Honor.

6 Q "In this group, the odds ratio for drinkers of more  
7 than 24 drinks per month was 1.6, compared with those who

8 drank less. Drinkers of more than 12 beers per month were  
9 1.6 times more likely to develop lung cancer than  
10 nondrinkers of beer, after controlling for age, years of  
11 education and cigarette smoking. 95 percent confidence  
12 interval, et cetera."

13 Did I read that correctly, doctor?

14 A Yes, except you left out the most important thing  
15 which is what the confidence interval is. And the  
16 confidence interval is 1.0 to 2.4, which again means it's a  
17 modest effect. It's hard to see it in a population of 280  
18 patients. It is an effect that is modest. I've already  
19 said alcohol does that have a modest effect.

20 Q Would you agree the relative risk would be about 1.6.

21 A I agree the relative risk would be about 1.5.

22 Q 1.5?

23 A Yes.

24 Q Okay.

25 Doctor, you would agree, would you not that  
1182

CROSS - SIDRANSKY

1 Large scale clinical trials are necessary to validate the  
2 clinical tests for diagnosing disease?

3 A Correct.

4 Q Is it your testimony that you consider the test on 45  
5 patients, 27 smokers and 18 nonsmokers, four of whom are  
6 from Spain, two of whom are from Wisconsin, to be a large  
7 enough well controlled clinical trial sufficient to  
8 establish your test as reliable for the identification of  
9 tobacco related etiology of a disease such as lung cancer?

10 A Well, the answer to that is yes.

11 But again, the way you phrased the answer I  
12 really can't answer the question. I really can't answer it  
13 correctly, which is, it is based on that and additional  
14 articles which have been cited here which report other  
15 losses again in patients, smokers versus nonsmokers. It is  
16 the combination of that literature, including the last  
17 article, I rely on.

18 Q But neither you nor anyone has conducted a large scale  
19 well controlled clinical trial, is that correct?

20 A Well, the issue of well controlled here, because this  
21 isn't specifically an epidemiologic study looking at  
22 associations, it is not clear to me. We have not conducted  
23 a larger trial, a larger number of patients. If you mean  
24 controlling, we are controlling for demographic subjects.  
25 The larger number of patient's, the easier it is to control

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CROSS - SIDRANSKY

1 for those larger number of patients.

2 Q Isn't it correct that the type of alterations found in  
3 Mr. Tompkin have not been shown by any rigorous validation  
4 study to be a specific marker for lung cancer?

5 A By any rigorous study, again, I think I would argue  
6 with that; as I said, I think there is a body of literature  
7 now that supports doing this molecular testing looking for  
8 patterns between smokers and nonsmokers. In my mind, I  
9 wouldn't have said it otherwise the number of articles now  
10 to be sufficient to do this kind of testing.

11 Q Doctor, are you acquainted with an organization called  
12 The Institute of Medicine?

13 A No.

14 Q Okay. Let me show you -- I would like to show you a  
15 book and ask you if you can identify this book; and if you  
16 can't, fine.

17 I've shown you a copy of a book, doctor, called  
18 Clearing the Smoke by the Institute of Medicine. Are you  
19 familiar with that book?  
20 A No.  
21 Q Never seen it before?  
22 A No.  
23 Q Let me ask you, doctor, if you can turn to page -- I  
24 just want to ask you a couple questions about this, and can  
25 you turn to Roman Numeral V?

1184

CROSS - SIDRANSKY

1 MR. SMITH: I would object, your Honor.  
2 MR. MILLIMAN: Your Honor, I want to try to  
3 establish this as a authoritative treatise through the  
4 witness. If I can, fine; if I can't, fine.  
5 THE COURT: Roman Numeral V, what page.  
6 MR. MILLIMAN: It is page Roman Numeral V. It  
7 is the fourth page, your Honor.  
8 THE COURT: Oh, just at the very beginning?  
9 MR. MILLIMAN: Right.  
10 Q Do you see those names, Dr. Sidransky?  
11 A I'm still looking for Roman Numeral V. I've got it,  
12 I've got it.  
13 THE COURT: Very first page in --  
14 THE WITNESS: I've got it.  
15 THE COURT: It is "Committee to Assess the  
16 Science Basis for Tobacco Harm Reduction.  
17 BY MR. MILLIMAN:  
18 Q Do you have that there, doctor?  
19 A Yes.  
20 THE COURT: When was this document published?  
21 MR. MILLIMAN: This was published in 2001.  
22 MR. SMITH: As again published.  
23 MR. MILLIMAN: Yes.  
24 Q And I want to ask, doctor, if you recognize the names  
25 of the Committee to Assess the Science Base for Tobacco Harm

1185

CROSS - SIDRANSKY

1 Reduction?  
2 A I recognize some of the names.  
3 Q And are these qualified people in the field?  
4 A Yes.  
5 Q Are they eminent scientists and researchers?  
6 A Some I know, yes, the others I have no idea who  
7 they are.  
8 Q Could you tell us who you know?  
9 A Sure. Adi Gazdar, I know he's a pathologist that  
10 works out of Southwestern. Gary Giovino is a well known  
11 statistician out of Roswell Park. Peter Shields has worked  
12 on epidemiology at Georgetown University, and Neal Benowitz  
13 is well known from UCSF.  
14 Q And doctor, if you turn to the next page, Roman  
15 numeral VII?  
16 A Yes.  
17 Q And it shows reviewers, and does that mean this  
18 document has been peer reviewed?  
19 A I'm reading through it.  
20 Q Okay.  
21 A Not exactly, I mean it has been peer reviewed by --  
22 usually peer review means the people that write an article  
23 or book chapter may have to respond. And the way it's  
24 written here, they basically received candid and critical  
25 comments but were not necessarily obligated to incorporate

CROSS - SIDRANSKY

1 them into the manuscript.  
2 Q Are you acquainted with some of the reviewers?  
3 A Yes.  
4 Q And are these some of the eminent scientists in the  
5 field?  
6 A Some are very well, known, yes.  
7 Q For example, Frederica Perrera?  
8 A Yes.  
9 Q And who is she?  
10 A She's an epidemiologist does molecular epidemiology  
11 out of Columbia University, and John Samet at Johns Hopkins.  
12 Q Can you accept this book as a learned treatise?  
13 A No.  
14 Q And you never have seen it before?  
15 A No.  
16 Q Never read it?  
17 A No.  
18 Q Not familiar with it at all?  
19 A No.  
20 MR. SMITH: I would like for the witness --  
21 THE COURT: Wait, let the questioning go on.  
22 Don't.  
23 MR. MILLIMAN: It's an advanced copy, your  
24 Honor.  
25 THE COURT: He said he does not recognize it.

1187

CROSS - SIDRANSKY

1 Next question.  
2 BY MR. MILLIMAN:  
3 Q You would agree, doctor, wouldn't you, that there are  
4 no statistically significant differences in the frequencies  
5 or patterns of the allele loss between current and former  
6 smokers?  
7 A We haven't been able to see them, that is correct.  
8 Q In fact, you told Mr. Cofer you lumped former smokers  
9 with current smokers?  
10 A Correct.  
11 Q And you would also agree, wouldn't you, doctor, that  
12 the epidemiological data reflects that, and assume this  
13 hypothetical; if a person with a 15 year pack history who  
14 has quit for 27 years before being diagnosed for lung  
15 cancer, that his relative risk would be almost the same as a  
16 person who has never smoked?  
17 A Well, I think I answered that question earlier, but  
18 when I said that I thought the relative risk would fall down  
19 close to baseline but does not reach baseline, it is still  
20 elevated.  
21 Q So in your report you have taken a person who has quit  
22 smoking for 27 years, and put him in the same risk category  
23 as one who smoked, I believe, for 40 years, is a current  
24 smoker 40 paneling years.  
25 A That is not what I did. I took molecular markers we

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CROSS - SIDRANSKY

1 used before to establish a pattern in smokers and  
2 nonsmokers, tested it in this patient, and saw that the  
3 pattern is very consistent with a smoking pattern.  
4 Q But you had no patient who had quit smoking for 27  
5 years who had only a 27 year pack history, correct?  
6 A Correct.  
7 Q So you would put Mr. Tompkin in that same category as



8 current smokers?  
9 A I wouldn't put him in the same pattern; I would say  
10 the pattern in his genetic tumors are consistent with  
11 patients who have smoked.  
12 Q Doctor, you talked about, you would agree that  
13 multiple genetic mutational events are genetic mutational  
14 events required for induction of lung cancer?  
15 A Right.  
16 Q And you've already testified, I believe, doctor, that  
17 investigators have concluded that mutations in the P53 and  
18 K-ras genes are associated with lung cancer?  
19 A Correct.  
20 Q And you would agree, then, that two key mutationally  
21 events for tobacco related lung cancer are absent from  
22 Mr. Tompkin's lung tumor?  
23 A I don't know exactly what key means; they both occur  
24 with a frequency of less than 50 percent, even with tumors  
25 from smokers; about 30 percent of smokers have arrest  
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CROSS - SIDRANSKY

1 mutation and 40 percent have a P53 alteration. So yes, both  
2 of those are absent in Mr. Tompkin's case as well.  
3 Q And how many of the 27 smokers in your study who had  
4 lung cancer had negative findings of P53 and K-ras?  
5 A It's going to be about a same percentage; it is going  
6 to be about 70 percent not have K-ras and 50 percent will  
7 not have P3 mutation.  
8 Q Did you study for those mutational events for P53?  
9 A They were available to us.  
10 Q Were they in your study.  
11 A We didn't put things in this study, but we published  
12 many times for K-ras and P53.  
13 Q Doctor, in your February paper --  
14 MR. MILLIMAN: Can we use the Elmo, your Honor?  
15 THE COURT: You are using one of his documents?  
16 MR. MILLIMAN: Yes, your Honor, his report.  
17 THE COURT: Go ahead.  
18 We are going to take about a five minute  
19 break at this time. The jury may file out.  
20 (Brief recess.)  
21 BY MR. MILLIMAN:  
22 Q Dr. Sidransky, I probably have about five more  
23 minutes. I'm going to be brief.  
24 A All right.  
25 Q Doctor, you would agree, talking about P53 mutations,

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CROSS - SIDRANSKY

1 that they occur more frequently in smokers than in  
2 nonsmokers, wouldn't you?  
3 A Correct.  
4 Q And the same with K-ras. K-ras mutations occur more  
5 frequently in smokers than in nonsmokers?  
6 A Correct.  
7 Q And these results are based on numerous replicated  
8 studies, haven't they?  
9 A Correct.  
10 Q And this is well known now, isn't it?  
11 A That is true.  
12 Q Doctor, I want to take your February paper that you  
13 relied upon in your opinion?  
14 A Okay.  
15 Q And you have that with you?  
16 A Yes.

17 Q And doctor, I want to put on the screen -- I'm going  
18 to refer to page 1312. I want to put page 1312 up on the  
19 screen. Doctor, I don't know quite how to focus this, but  
20 doctor, can you read to the jury?

21 THE COURT: Is there a better way to focus  
22 because it is really blurry?

23 BY MR. MILLIMAN:

24 Q Move it up and focus in if you can.

25 Still not coming out very good, is it.

1191

CROSS - SIDRANSKY

1 Doctor, and I'm not sure the jury will be able  
2 to see it, but perhaps you can read it from your chart.

3 A Okay.

4 Q It says, starting with "although other investigators"?

5 A Where are you?

6 Q Right here, the second paragraph, the -- I believe it  
7 is it is the third sentence starting with "although other  
8 investigators"?

9 THE COURT: You want him just to read it?

10 MR. MILLIMAN: Yeah, I want him to read that  
11 sentence. The jury can't see it. I can read it, the  
12 jury can't see it.

13 THE COURT: Whoever reads it I want them to  
14 read it slowly.

15 BY MR. MILLIMAN:

16 Q Would you read it slowly, doctor?

17 A That's why you want me to read it, right?

18 Q You've got that right.

19 A "Although other investigations have previously shown  
20 that LOH, that's capital L-O-H, at 3P and 9P may be less  
21 common in lung tumors from nonsmokers, our work is the first  
22 to look at almost each chromosomal arm in lung  
23 adenocarcinoma, that's A-D-E-N-O, carcinomas from  
24 nonsmokers."

25 Q Okay, doctor. And you have, I believe, a footnote

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CROSS - SIDRANSKY

1 reference behind that sentence, footnote number 7 being one  
2 of them?

3 A Correct.

4 Q And what is does footnote number 7 refer to?

5 A Difference of allele type. It is a paper referencing  
6 a paper in cancer research. First author is Sato, S-A-T-O,  
7 and it is entitled "difference of allele type between  
8 squamous cell carcinoma adenocarcinoma of the lung.

9 Q Doctor, I'm going to show you a copy of that paper?

10 A Okay.

11 MR. MILLIMAN: May I approach, your Honor?

12 THE COURT: Yes.

13 You want this down now?

14 MR. MILLIMAN: I'm going to use it one more  
15 time, your Honor, If I may.

16 Q Doctor, I want you to refer to page 5654 of that  
17 paper.

18 A 5654, okay.

19 Q This is a paper you cited in your February study,  
20 correct?

21 A Yes.

22 Q And I would like to show you, doctor, if I could, the  
23 chart at the bottom of the page, right here. And doctor, I  
24 believe it says, Table 6, the correlation between LOH on six  
25 chromosomal arms and smoking for patients with

## CROSS - SIDRANSKY

- 1 adenocarcinoma of the lung, correct?  
2 A Correct.  
3 Q And he cites, lists the chromosomal arm, correct?  
4 A Yes.  
5 Q He shows the allelic loss informative cases, based on  
6 percentage, correct?  
7 A Correct.  
8 Q And he shows smoker and nonsmoker, correct?  
9 A Correct.  
10 Q And for 3P, he shows 17 of 51 smokers had a an allelic  
11 loss on chromosome 3P, correct?  
12 A Correct.  
13 Q As 33 percent. For nonsmoker, doctor, he showed 15 of  
14 32 had an allelic loss, correct?  
15 A Correct.  
16 Q And that's 47 percent of nonsmokers, correct?  
17 A Correct.  
18 Q With respect to 9P, he shows an allelic loss of 11 out  
19 of 22 for smokers of 50 percent, correct?  
20 A Correct.  
21 Q And an allelic loss of 5 of 21 or 24 percent for  
22 nonsmokers, correct?  
23 A Correct.  
24 Q And you have no reason to doubt Mr. Sato's findings?  
25 A Oh, yes, I do.

1194

## CROSS - SIDRANSKY

- 1 Q You do?  
2 A This is why you just can't put out one article and  
3 look at a table.  
4 First of all, there is absolutely no mention of  
5 the way the patients were classified for smoking versus  
6 nonsmoking habits. This is a major problem, especially in  
7 other parts of the world. Because what happens is that  
8 patients that have been former smokers or had a significant  
9 number of pack years, they come into the clinic and say I'm  
10 not smoking now and are misclassified. In addition to  
11 that, this is not relevant specifically to this case  
12 because it also combines squamous cell carcinomas, which is  
13 a different histologic entity with adenocarcinoma. So  
14 there is many reasons why these numbers can't be accepted.  
15 Q Doctor, the fact of the matter is, you cited this  
16 article as a reference in your February report, did you not?  
17 A I cited this article to show differences between  
18 squamous cell carcinomas and adenocarcinoma, that's what the  
19 reference was; it was not a reference to the smoking.  
20 Q But his chart that we just saw up there only dealt  
21 with adenocarcinoma, didn't it? I'm not asking, I'm  
22 sorry --  
23 A Yes, that is correct.  
24 Q And all I'm asking you is, if his testing of allelic  
25 loss -- if you have, if you have any reason to question just

1195

## CROSS - SIDRANSKY

- 1 the findings of the allelic loss -- I'm not asking you the  
2 question whether or not the conclusions of his report are  
3 correct -- but his findings of allelic loss, do you have any  
4 reason to dispute those?  
5 A Not for the markers he tested, no.  
6 Q And doctor, let me show you, let me put this up on the  
7 board and ask if this chart represents what we have seen in

8 your testimony here?  
9 And in Sato's paper for allelic loss informative  
10 cases he had 33 percent of smokers had 3P allelic loss,  
11 correct?  
12 A Correct.  
13 Q And you had 37 percent?  
14 A Correct.  
15 Q With 9P he had 50 percent allelic loss for smokers,  
16 and your paper had 65 percent loss for allelic smokers,  
17 correct?  
18 A Correct.  
19 Q With nonsmokers he had a 47 percent finding of allelic  
20 loss and you had a 5 percent finding, correct?  
21 A Correct.  
22 Q And he had a 24 percent finding of allelic loss for 9P  
23 and you had 22 percent, correct?  
24 A Correct.  
25 Q Doctor, and I'm going to, I'm just about finished but  
1196

CROSS - SIDRANSKY

1 I do want to expand on what, what Mr. Cofer asked you about  
2 your statistical analysis?  
3 A Yes.  
4 Q Okay. And then I'm finished.  
5 A Okay.  
6 THE COURT: There is no need for any lawyer to  
7 tell any witness when they are about to finish. I've  
8 seen that happen time and time again. It is just a  
9 waste of time. You can ask questions until you are  
10 through, you don't have to tell the witness how long  
11 you are going to ask questions. And it doesn't help  
12 at all with the trial.  
13 BY MR. MILLIMAN:  
14 Q Doctor, can you read that chart?  
15 A Mr. Smith's head is in the way.  
16 MR. SMITH: I'm going to move it. They have  
17 got me covered from both sides.  
18 THE COURT: You can sit up in the jury box to  
19 see it. That is the best place to see it. You are  
20 not to contaminate the jurors, nor the jurors to be  
21 contaminated by your presence in the jury box. Let's  
22 move on.  
23 BY MR. MILLIMAN:  
24 Q And doctor, what you did, I believe, and let's see if  
25 I can follow this, you took the allelic loss or loss of  
1197

CROSS - SIDRANSKY

1 heterozygosity for smokers, correct?  
2 A Correct.  
3 Q And you -- I'm sorry, you took nonsmokers and  
4 multiplied that 3P loss times 9P loss times 16P loss?  
5 A Times 19P loss.  
6 Q 19P loss, I'm sorry. And that came out to about 1.5  
7 percent?  
8 A .15 percent.  
9 Q And that would show how many nonsmokers had a positive  
10 loss of heterozygosity, meaning there was an allelic loss,  
11 correct?  
12 A Correct.  
13 Q And that would be -- I rounded it up to two-tenths of  
14 a percent, is that okay?  
15 A Okay.  
16 Q Then what I believe you did, is you took a hundred

17 percent minus two tenths of a percent and you said that  
18 showed a 99.8 percent probability that a nonsmoker would not  
19 have loss of heterozygosity, correct?  
20 A Correct.  
21 Q And that should go over in this column, correct?  
22 A Correct.  
23 Q Now, Mr. Cofer told you, asked you to do this  
24 calculation for smokers, correct?  
25 A Correct.

1198

CROSS - SIDRANSKY

1 Q And we came out with about 14 percent of smokers  
2 showed a positive loss of heterozygosity, or allelic loss,  
3 correct?  
4 A Correct.  
5 Q And so that would go in this column, and this is, this  
6 is now accurate, right? Smokers, 14 percent loss of  
7 heterozygosity, we subtract it from a hundred percent,  
8 doctor, and then we come up with 86 percent of the smokers  
9 had no loss of heterozygosity, correct?  
10 A Had no loss of heterozygosity, no -- 86 percent of  
11 smokers did have losses at all 3 chromosomal arms.  
12 Q Right, a agree. So doctor, what you in effect did, is  
13 you took the 99.8 percent from this column and moved it up  
14 to this column to draw the conclusion that 99.8 percent of  
15 the smokers had an allelic loss in those three sites as  
16 opposed to 14 percent, isn't that correct?  
17 A No, what I did was basically show the odds of having a  
18 negative loss, that losses would be present at 3P, 9P and  
19 19P in a particular tumor from a nonsmoker is 99.8 percent  
20 chance it wouldn't be there. I didn't move it into any of  
21 the columns. Those numbers are all statistical  
22 representations and can also be looked at in different ways.  
23 Q But you can't draw the conclusion then that smokers  
24 had a 99.8 percent chance of a positive 3, 9, 19P  
25 combination?

1199

CROSS - SIDRANSKY

1 A Of course not. Their chance of having all three  
2 losses is 14 percent.  
3 MR. MILLIMAN: Thank you.  
4 Q Doctor, can you be, or any scientist ever be  
5 infinitely certain of any scientific conclusion you draw?  
6 THE COURT: Infinitely.  
7 BY MR. MILLIMAN:  
8 Q Infinitely certain?  
9 THE COURT: Is there an objection?  
10 MR. SMITH: Yes, your Honor.  
11 THE COURT: Objection sustained.  
12 MR. MILLIMAN: Hundred percent with exact  
13 certainty.  
14 MR. SMITH: Objection.  
15 THE COURT: Sustained. The evidence here is  
16 preponderance of the evidence, it's not 98 percent not  
17 99 percent, it's preponderance of the evidence. That  
18 question suggests it has to be hundred percent. That  
19 question is not appropriate and the objection is  
20 sustained.  
21 BY MR. MILLIMAN:  
22 Q Doctor, if you changed your 3P, I believe had one out  
23 of 18 in your calculation, correct?  
24 A Yes.  
25 Q Okay. If you changed that one out of 18 to zero out

## CROSS - SIDRANSKY

1 of 18, okay?

2 A Okay.

3 Q Instead of one you had zero and there is a 95 percent  
4 chance that people who are a nonsmoker did not have an LOH,  
5 right? What would that have done to your calculation?

6 A It obviously would have made it into zero. You have  
7 to be careful when you have zero the way you consider them  
8 in a statistical analysis, they have to be treated  
9 separately.

10 MR. MILLIMAN: Thank you, doctor.

11 THE COURT: Any -- does the other defendant  
12 wish to cross examine?

13 MR. MATTHEWS: No questions.

14 MR. WALSH: No, your Honor.

15 THE COURT: Redirect.

16 MR. SMITH: Yes, sir, your Honor.

17 - - -

18 REDIRECT EXAMINATION

19 BY MR. SMITH:

20 Q Dr. Sidransky, are the methods that you employed and  
21 the work that led to your paper --

22 THE COURT: You mean the February 2001, paper?

23 MR. SMITH: Yes, sir I was just.

24 THE COURT: He's written a lot of papers so you  
25 better be definitive.

1201

## REDIRECT - SIDRANSKY

1 MR. SMITH: I stopped until defense counsel was  
2 able to get to his seat.

3 Q That the work you did in conjunction with your  
4 February 2001 paper, was it the same methodology that you  
5 utilized in your work every day?

6 A That is correct. It is work that's been done for a  
7 decade.

8 Q Same methodology that you have used in your other  
9 papers?

10 A Correct.

11 Q What ways was it the same methodology that you  
12 employed in your analysis of this case?

13 A Of Mr. Tompkin's tumor, that is correct.

14 Q I want to ask you one question, just as a question.  
15 You dealt with books and papers; is there a difference  
16 between an advanced copy of something and something that has  
17 been published?

18 A Well, usually an advanced copy is something about to  
19 be published but predates the actual date that it's  
20 available to others.

21 MR. SMITH: May I pick a board, your Honor?

22 BY MR. SMITH:

23 Q Is the statistical analysis that you employed with  
24 that, as represented by this graph, the same that you used?

25 A That is correct.

1202

## REDIRECT - SIDRANSKY

1 Q I mean, in your every day work and in your other  
2 papers?

3 A That is correct.

4 Q And your paper, as you indicated, was the first one to  
5 look at all the chromosomal arms in conjunction with this  
6 question?

7 A Correct.

8 Q Now, would you let me move -- this says .0015, is that  
9 correct?  
10 A Correct.  
11 Q That represents what?  
12 A That represents the chance that you would find these  
13 three chromosomal changes in the tumor of a nonsmoker.  
14 Q And if I may turn that page, if you -- if I might ask  
15 the court if he might be permitted to go to the easel for a  
16 moment?  
17 THE COURT: Certainly.  
18 BY MR. SMITH:  
19 Q If you would please put that number up at .0015.  
20 If you -- and in addition to what you already  
21 have up there is the risk for nonsmokers, would you put up  
22 there what you determined the risk for smokers to have all  
23 three of those changes.  
24 (The witness did as instructed.)  
25 Q And this, this information, this conclusion is from  
1203

REDIRECT - SIDRANSKY

1 your original?  
2 THE COURT: Well, for the record, no one has  
3 any idea from the record what he just wrote down.  
4 MR. SMITH: I apologize, I thank you.  
5 THE COURT: You want your record to show that,  
6 you are going to have to ask him a question.  
7 BY MR. SMITH:  
8 Q Dr. Sidransky, what is the number for the risk of all  
9 three, of a smoker having changes at all three of these  
10 items?  
11 A 14 percent.  
12 Q And these conclusions, the 14 percent, and the  
13 .0015 percent, can be gleaned from your original paper  
14 before you ever heard of this David Tompkin, is that true?  
15 A Correct.  
16 Q Can you tell us what that makes -- can you tell us,  
17 first, are you able to determine the relative risks between  
18 a smoker and a nonsmoker based upon your February, 2001  
19 paper insofar as their having the changes?  
20 A Yes. All you have to do is basically divide one by  
21 the other to see what the relative risk is of one versus the  
22 other.  
23 Q And what is that number, please, or approximately that  
24 number?  
25 A It is approximately 14 percent, which is 0.14 versus  
1204

REDIRECT - SIDRANSKY

1 .00155. And essentially, because these numbers are the  
2 same, it is essentially hundred to one. So there is a  
3 hundred fold more chance this pattern will be seen in a  
4 smoker compared to a nonsmoker.  
5 Q Thank you very much.  
6 If I could ask you to stay there for one more  
7 moment.  
8 A Okay.  
9 Q There was a reference on cross examination to the fact  
10 that in your paper, of the 45 patients that were in the  
11 group, that you tested 28 smokers -- I get it wrong every  
12 time.  
13 27 smokers, 18 nonsmokers?  
14 A Correct.  
15 Q That there were 9 people in that group that had no  
16 changes, is that correct?

17 A That is correct.  
18 Q And you may be permitted to look at your paper to  
19 determine this, but I would like to know, of that 9, how  
20 many were nonsmokers?  
21 A Seven of the 9 were nonsmokers.  
22 Q So that means 7 of the 18 nonsmokers in your study had  
23 no changes at all?  
24 A That is correct.  
25 Q Now, of those who were smokers that had no changes,

1205

REDIRECT - SIDRANSKY

1 how many were there?  
2 A Two.  
3 Q And that would be two out of?  
4 A 27.  
5 Q So on that basis alone, the odds for a smoker?  
6 THE COURT: You are leading the witness.  
7 BY MR. SMITH:  
8 Q Do you have an opinion, Dr. Sidransky, as to what that  
9 would indicate, based upon your study as to the odds, if you  
10 come in at it from that direction of a smoker having no  
11 changes?  
12 A Obviously it would be very small. Most smokers do  
13 have changes, do have allele changes.  
14 Q So it is 2 out of 27 versus 7 out of 9.  
15 MR. COFER: Objection. Leading.  
16 THE COURT: Objection sustained. He's already  
17 given his testimony. If the jury is paying attention  
18 they got it the first time. There is no sense in  
19 constantly repeating the same concept.  
20 MR. SMITH: I was trying to capsulize it. I'm  
21 sorry.  
22 THE COURT: Well, they got it. Are you about  
23 through with the doctor?  
24 MR. SMITH: I'm very close, your Honor. I  
25 would like to finish so I could get him back at Johns

1206

REDIRECT - SIDRANSKY

1 Hopkins. I want to see counsel at the bench before  
2 you stop, so let's hurry on.  
3 BY MR. SMITH:  
4 Q In your study you defined nonsmokers as those who had  
5 less than 100 cigarettes in their lifetime, as best you can  
6 determine?  
7 A Right.  
8 Q Can you tell us whether or not you have an opinion as  
9 to whether every puff that is taken from a cigarette  
10 contributes to the process you described to us earlier?  
11 A Well, absolutely. It can be any puff and, as I've  
12 said, it could be the first puff, anything in-between to the  
13 last one. Each of these puffs can cause genetic damage and,  
14 if it is not repaired in the cell, can lead to the cancer  
15 process.  
16 Q Is lung cancer a dose response disease?  
17 A To smoking, yes. The more you smoke, the more likely  
18 you are to get lung cancer; that is correct.  
19 Q If you had -- withdraw that.  
20 If you were back in the old days -- and by the  
21 old days I mean before these tests were done, over a year  
22 ago, would what you've heard about epidemiology and biology  
23 in this case, the fact that there was asbestos fibers  
24 found, the fact that he started smoking when he was  
25 about -- excuse me, I'm sorry, am I interrupting you?



## REDIRECT - SIDRANSKY

1 MR. COFER: I'm going to make an objection  
2 before he answers. Please don't answer.  
3 MR. SMITH: I'll instruct him. Hard for him to  
4 see two people at once.  
5 THE COURT: Your question is already off on the  
6 bad foot. Why don't you start over.  
7 MR. SMITH: Thank you, your Honor.  
8 THE COURT: Are you going to ask him for an  
9 opinion.  
10 MR. SMITH: I'm going to ask him if it would  
11 change his opinion because it was brought up on cross.  
12 Q The information that was brought up on cross  
13 examination regarding asbestos, regarding the fact he  
14 started smoking when he was 16, he quit when he was 30 or  
15 31, he was diagnosed with lung cancer 27 years later, would  
16 those facts change your opinions that you have expressed  
17 today?  
18 MR. COFER: Objection. Beyond the scope of his  
19 report.  
20 MR. SMITH: I apologize.  
21 THE COURT: Wait a minute. Let me see counsel  
22 at the bench.  
23 (The following discussion was conducted  
24 at the side bar, between court and counsel, out  
25 of the hearing of the jurors, as follows:)

## REDIRECT - SIDRANSKY

1 MR. COFER: Your Honor, permit us to supplement  
2 additional experts. Your Honor told us we must have,  
3 reports, and we had a limited amount of time to  
4 conduct depositions. We limited it to four hours.  
5 The opinion that Mr. Smith is attempting to elicit is  
6 beyond the scope of his report. I did not have an  
7 opportunity to inquire into it at his deposition.  
8 This witness has testified that his opinion is based  
9 solely on his LOH analysis, his understanding of  
10 Mr. Tompkin's smoked approximately 15 pack years, and  
11 his understanding of the molecular literature.  
12 I object to Mr. Smith now asking him to  
13 consider other factors for his opinion.  
14 THE COURT: All right. Your objection is  
15 overruled. You raised the factors; once you raise the  
16 factors it is appropriate for redirect examination.  
17 The objection is overruled.  
18 (The following proceedings were conducted  
19 in open court.)  
20 BY MR. SMITH:  
21 Q Dr. Sidransky, based upon what you were asked about  
22 during cross examination, and specifically I'm referring to  
23 the items involving David Tompkin's history, the fact that  
24 he had asbestos fibers found in the tissue burning, the fact  
25 that he started smoking when he was around 16 years of age,

## REDIRECT - SIDRANSKY

1 the fact that he quit smoking when he was approximately 30  
2 or 31 years of age, and the fact that he was diagnosed with  
3 lung cancer approximately 27 years later, would those  
4 additional facts in any way change the opinions you have  
5 rendered today?  
6 A No. I still rely on the molecular pathology, and I  
7 believe his pattern is consistent of a smoker.

8 Q You were specifically asked with respect to asbestos,  
9 can you tell us whether or not, in your opinion, there is a  
10 synergistic effect between asbestos and smoking?  
11 MR. McLAUGHLIN: Objection, your Honor.  
12 THE COURT: Sustained.  
13 MR. SMITH: Thank you very much for coming, Dr.  
14 Sidransky.  
15 THE WITNESS: Thank you.  
16 THE COURT: May I see counsel at the bench,  
17 please.  
18 (The following discussion was conducted  
19 at the side bar, between court and counsel, out  
20 of the hearing of the jurors, as follows:)  
21 THE COURT: Well, counsel for the defendant has  
22 already indicated to me that he is -- Mr. Cofer has  
23 indicated to me he wants the opportunity to make a  
24 motion to strike the testimony of this witness. And  
25 that would be forthcoming after the jury is out of the  
1210

REDIRECT - SIDRANSKY  
1 courtroom.  
2 There has been no testimony offered as to how  
3 the, quote, Tompkin tissue signs got to this witness.  
4 And what I want to know is, is that going to be a part  
5 of your motion to strike, or are you waiving the issue  
6 that he saw a doctor, that the slides he saw were  
7 those of David Tompkin?  
8 MR. COFER: We're stipulating he tested the  
9 right materials.  
10 MR. SMITH: That would be on both sides.  
11 MR. COFER: Thank you, Russ. All I wanted to  
12 do was alert the court for the record I wanted to  
13 renew my motion. I did it before he testified, after  
14 he testified.  
15 THE COURT: I just want to be sure we are not  
16 going to have an issue because, as I understand it,  
17 Mr. Smith, in effect, got the slides too.  
18 MR. COFER: We stipulated.  
19 THE COURT: And that's not in front of the  
20 jury. I don't think you need to do it as long as  
21 there is no dispute. I just didn't want to excuse  
22 this witness and have this issue raise its ugly head.  
23 MR. COFER: No, we are clear on that. I have  
24 about 2 minutes of recross. Literally 2 minutes.  
25 THE COURT: I want to complete his testimony,  
1211

RECROSS - SIDRANSKY  
1 but we are not going to have any interrupt argument or  
2 any other motions. I'm already late on my criminal  
3 docket. Let's get this out of the way.  
4 MR. COFER: Can I have interim argument after  
5 lunch?  
6 THE COURT: Yes.  
7 (The following proceedings were conducted  
8 in open court.)  
9 - - -

10 RECROSS EXAMINATION

11 BY MR. COFER:  
12 Q Okay. Let me see if I can clear something up. 45  
13 people in your study, right?  
14 A Yes.  
15 Q They all had adenocarcinoma, correct?  
16 A Correct.

17 Q 27 smokers, 18 nonsmokers, right?  
18 A Correct.  
19 Q Some had losses, some don't have losses?  
20 A Correct.  
21 Q Some had various combinations of these losses,  
22 correct?  
23 A Correct.  
24 MR. COFER: Thank you. That's all I have.  
25 THE WITNESS: Okay.

1212

RECROSS - SIDRANSKY

1 THE COURT: Anything further from any other  
2 defendant?  
3 MR. MILLIMAN: No, your Honor.  
4 THE COURT: Very well, that concludes the  
5 examination of the doctor. Is there any reason that I  
6 should not excuse him from further participation in  
7 this case?  
8 MR. McLAUGHLIN: No, your Honor.  
9 THE COURT: You are free to go, doctor. Thank  
10 you.  
11 We are going to take the noon time recess.  
12 We will resume at 1:00 o'clock. Please file out.  
13 I would ask counsel to be back at about five  
14 minutes to one so you can put your motions on the  
15 record.

(Luncheon recess.)

1213

1 (Proceedings at side-bar:)  
2 MR. COFER: Your Honor.  
3 THE COURT: Let the record show that the jury  
4 has not been returned to the courtroom.  
5 I understand counsel for the defendant has a  
6 motion.  
7 MR. COFER: Yes, Your Honor.  
8 We move to strike the testimony of  
9 Dr. Sidransky under Federal Rules of Evidence 702, Daubert  
10 and its progeny, and for the reasoning in the case law, and  
11 we would cite the prior motion in limine that we have filed  
12 and that the Court has reviewed.  
13 THE COURT: The motion is overruled.  
14 You've preserved the error, if there is in  
15 fact one, and in fact if the plaintiff wins I'm sure the  
16 Sixth Circuit will have a good time examining the issue.  
17 Are we ready to go now?  
18 MR. COFER: Let me request interim argument.  
19 THE COURT: Yes.  
20 MR. COFER: Let me show you one board that  
21 I'm going to use so you are not surprised, and so you are  
22 not, Russ. You saw it, actually, in my opening.  
23 The Court has indicated you want to see what  
24 we would show the jury.  
25 THE COURT: Sure. It's okay. You already

1214

1 showed that.  
2 MR. SMITH: Your Honor, we would like to  
3 learn from the Court, if there is -- we have postponed  
4 raising the question of TI and TIRC documents, and I want  
5 to raise it now.  
6 THE COURT: I'm not sure what you are  
7 raising.  
8 MR. SMITH: We wanted to get the Tobacco and  
9 Health newsletters that went out, the Tobacco Facts, the  
10 various publications that were sent out to doctors.  
11 THE COURT: You mean that haven't been  
12 mentioned yet?  
13 MR. SMITH: That have not been published.  
14 There was some mention in cross-examination,  
15 but most of them she denied, but we want to be able to  
16 publish them as bearing on a lot of issues.  
17 THE COURT: The only reason I'm going to  
18 allow them to consider those exhibits at the moment is how  
19 it weighs on the credibility of Dr. Hoff. I've made it  
20 pretty clear it's for that purpose, and that's the only  
21 purpose.  
22 I'm not going to have just a garden variety  
23 admit all the Tobacco Institute evidence, so I'm not quite  
24 sure what you are asking me to do.  
25 I'll handle your exhibits at the end of your  
1215

1 case in chief.  
2 MR. SMITH: We wanted to -- we were  
3 requesting leave to offer them.  
4 THE COURT: With a witness on the stand?  
5 MR. SMITH: No, for us to publish them to the  
6 jury.  
7 THE COURT: No, we are not going to do that,  
8 Mr. Smith. There will have to be a witness on the stand  
9 and it has to be related to a witness's testimony and after  
10 I've already said it's admissible.  
11 So I will not have an ordinary -- just  
12 publish exhibits without a witness on the stand.  
13 MR. SMITH: What we are requesting, Your  
14 Honor, is that if we establish they are admissible, that we  
15 be permitted to --  
16 THE COURT: You do that with witnesses'  
17 testimony. You don't just do it by argument.  
18 I'm still having a hard time tracking where  
19 you are going here.  
20 MR. SMITH: Well, it's the same -- originally  
21 when the case was filed --  
22 THE COURT: Russ.  
23 MR. SMITH: -- they filed a motion in limine  
24 to prevent us, and we have been trying to work our way  
25 through it.

1216  
1 THE COURT: I sustained it. I made an  
2 exception with Dr. Hoff. I gave you all kinds of latitude  
3 to run with Dr. Hoff on those exhibits as it related to her  
4 credibility with respect to her opinion on common  
5 knowledge.  
6 Now, that's the way I'll let them in, because  
7 it became apparent that the only thing she was interested  
8 in in her examination of the literature, that it excluded  
9 anything the tobacco companies said. That was of no  
10 interest to her. She, I thought, very well-established  
11 that.

12 MR. SMITH: If I might ask the Court to  
13 consider two possibilities. We would request the Court to  
14 follow the Court's suggestion, to put them in for  
15 challenging her credibility.  
16 THE COURT: Well, that's an issue I'll  
17 address when it comes time to offer your exhibits. I will  
18 not interrupt the trial to piecemeal handle your exhibits.  
19 I'll handle them at the end of your case in chief.  
20 MR. SMITH: And there is a second request I  
21 ask the Court to consider.  
22 THE COURT: Go ahead.  
23 MR. SMITH: And that is this: I don't know  
24 if this is raised in the written briefings or not. I think  
25 it is, but I can't swear to it.

1217

1 The question is simply this: In view of the  
2 fact that three of the four defendants had people in the  
3 Tobacco Industry Research Committee and all four defendants  
4 had people in the Tobacco Institute -- and when we say  
5 "people," we are talking about high-ranking people of their  
6 companies -- when this material was going out, it would  
7 stand to reason that those companies had direct notice of  
8 what was going to the public.  
9 And we would respectfully request that that  
10 be permitted to go in to establish their knowledge of an  
11 increased risk that the public would be mistaken about the  
12 relationship and, thus, enhance their duty to warn.  
13 They had direct knowledge of what's  
14 happening. It's -- they are right at center stage.  
15 THE COURT: Well, what do you want me to do?  
16 MR. SMITH: We would request the Court to  
17 permit us to put those documents into evidence.  
18 THE COURT: Without a witness on the stand?  
19 MR. SMITH: With or without.  
20 I mean, they are documents that we can  
21 establish to the Court's satisfaction their relevancy, and  
22 it would -- I have been in cases where we put documents in  
23 before, if we establish to the Court's satisfaction that  
24 they were admissible.  
25 THE COURT: Well, I'll take it under

1218

1 consideration, when you offer your exhibits at the end of  
2 your case in chief.  
3 Are we ready to go now?  
4 MS. CHAPMAN: Your Honor, one question.  
5 Dr. Burke at some point this afternoon I  
6 believe is the next witness.  
7 MR. SMITH: And Dr. Burke, that raises the  
8 second question.  
9 Dr. Burke is here, Your Honor, and we would  
10 request that Dr. Burke be permitted to testify as to the  
11 values of the holding companies, and we also request that  
12 Dr. Burke be permitted to testify as to what a person -- as  
13 to what one or more of the accepted methods for determining  
14 the value of a subsidiary of a holding company is.  
15 Not for him to --  
16 THE COURT: His testimony is going to be  
17 limited to his initial expert report. I've already said  
18 that. I am not going to change my mind on that. We  
19 addressed that before the trial.  
20 I don't -- I don't have a copy of that  
21 report, but the moment he strays away from that initial  
22 report and there's objection, I'll shut you down.

23 Now, if you want me to voir dire his  
24 testimony ahead of time, maybe I better do that. But if I  
25 have to do that, I'm going to count the time against you,  
1219

1 Russ.  
2 MR. SMITH: Your Honor, when you say he would  
3 be limited to the original report, that would preclude him  
4 from testifying as to the methodology that would be used if  
5 we were going to determine the value of a subsidiary.  
6 THE COURT: I don't remember what his initial  
7 report says. I don't have that.  
8 MR. SMITH: Frankly, it does not say that,  
9 it's not covered up or down. It just gives -- it gives  
10 opinions as to values of --  
11 THE COURT: That was his initial report?  
12 MR. SMITH: Yes, sir.  
13 THE COURT: Well, that's --  
14 MR. SMITH: I'll take Diane's word for it,  
15 I'm sure.  
16 THE COURT: If someone would make a copy  
17 available to me.  
18 MS. CHAPMAN: Your Honor, on behalf of --  
19 THE COURT: Let's get going. It's ten after  
20 1:00. The jury wonders if I've lost my mind. I told them  
21 1:00 o'clock.  
22 MS. CHAPMAN: On behalf of the defendants,  
23 that is only a valuation of the parent companies, Your  
24 Honor. And the defendants are not reflected, there is  
25 nothing about the financial condition of the defendants in  
1220

1 May 18th.  
2 And an even larger problem, Your Honor, is  
3 there are at least three Ohio cases that I have that I  
4 could produce to the Court now in my briefcase that show  
5 the extreme prejudice of putting anything about the  
6 financial condition of either the actual defendants in this  
7 case, but it's even more awful because they are the parent  
8 company, so the numbers are enormous. And prejudice is not  
9 something that can be cured in the event the Court does not  
10 give a charge on punitive damage.  
11 That's the only purpose this information  
12 would be relevant, and so far Your Honor has told us that  
13 that particular issue is one under advisement by the Court.  
14 So Russ is trying to rush into this, and I  
15 don't see that we are there, Judge.  
16 How can we cure this? He's got a number for  
17 the Philip Morris Company's holding company, it's like a  
18 hundred billion dollars.  
19 MR. SMITH: I would respond two statements.  
20 One, I --  
21 THE COURT: I don't want to hear any more  
22 about it. I will bring the jury in, I will hear the  
23 interim argument, and then if you need to talk to me about  
24 Dr. Burke before he comes in, I will hear it.  
25 I don't want to wait any longer to bring the  
1221

1 jury in.  
2 MR. SUFFERN: Thank you, Your Honor.  
3 (End of side-bar conference).  
4 (Jury in).  
5 THE COURT: Please be seated.  
6 Members of the jury, counsel have requested  
7 the opportunity for interim argument.

8 Mr. Cofer, you may proceed.  
9 MR. COFER: Thank you, Your Honor.  
10 Good afternoon, members of the jury.  
11 One year ago Dr. Sidransky testified under  
12 oath that there was no test or procedure that could be used  
13 to determine the cause of a particular person's cancer.  
14 Nine months later, in May of this year, he  
15 changed his mind. Today marks the first time in history  
16 that Dr. Sidransky, or to his knowledge anyone, has  
17 testified in a Court of law that LOH analysis can be used  
18 to determine the cause of a particular person's cancer; in  
19 this case, Mr. Tompkin's cancer.  
20 His LOH analysis does no such thing, and  
21 cannot enable him to do that. And here are the facts on  
22 his LOH analysis and Mr. Tompkin.  
23 You can have LOH at 3P, and 9P and 19P, just  
24 like Mr. Tompkin did, and not get lung cancer.  
25 You can have no LOH at 3P, 9P and 19P and get  
1222

1 lung cancer.  
2 And, as Dr. Sidransky conceded, there was no  
3 one like Mr. Tompkin in Dr. Sidransky's study. There was  
4 no one who had a 15 pack year history and quit smoking for  
5 27 years before he was diagnosed with lung cancer, and for  
6 30 years before he died of lung cancer.  
7 Dr. Sidransky cites one article in his  
8 report. It's a study that he and some other authors did in  
9 February of this year. It had 45 patients. It has never  
10 been repeated or replicated. It has never been tested.  
11 Now, make no mistake about it, Dr. Sidransky  
12 is a pioneer. He is an important man of science. He's  
13 doing important research that will benefit all of us.  
14 Maybe one day Dr. Sidransky will find a test or procedure  
15 that enables us to determine what caused a particular  
16 person's cancer.  
17 Maybe one day, Dr. Sidransky will find a cure  
18 for cancer. We all hope he does.  
19 But, members of the jury, today is not that  
20 day.  
21 Thank you very much.  
22 MR. SMITH: May it please the Court, ladies  
23 and gentlemen of the jury, desperate fact situations  
24 require desperate arguments, even by a team as competent  
25 and as excellent as the eight lawyers representing the  
1223

1 defendants here.  
2 I agree wholeheartedly with Attorney Cofer's  
3 statement that this is the first time that any jury has  
4 ever heard that testimony today, is today. And I'm  
5 submitting one thing to you: The tobacco industry hates to  
6 hear it, because that type of testimony means that it  
7 becomes increasingly more difficult for the tobacco  
8 industry to hide behind the causation issue because that is  
9 applying hard, cold science.  
10 The three items that Attorney Cofer put up on  
11 their board, no one has said that you could have those  
12 changes and not get cancer. No one has said that.  
13 Although it is true that it has been said that the chances  
14 of a nonsmoker getting those changes is .0015, but no one  
15 has testified that you couldn't get them and not have  
16 cancer.  
17 What the test was designed for was to find  
18 out the protocol, the relationship of smokers and

19 nonsmokers, a hundred to one.  
20 The second item is that you could have  
21 them -- I mean, you could get cancer if you didn't have  
22 them. It's true. Anything is possible. I mean, I could  
23 show up at Cleveland stadium and go to bat and I might get  
24 a hit, and that would be laughable. The odds would be so  
25 great against it. But anything is possible.

1224

1 And no one is here to say it isn't.  
2 But as His Honor Judge Dowd has indicated, we  
3 are dealing with probabilities. We -- this case is a 51%  
4 question. Although Dr. Sidransky's studies, they are  
5 awesome, and they later, they tried to pull it out on  
6 cross-examination, but when you look at it, .0015 as  
7 related, compared to .15, is a hundred to one in favor of  
8 Dr. Sidransky's study.

9 You heard the man. You saw the man. You saw  
10 his motives. There will be witnesses, some witnesses get  
11 paid in these cases, some don't, and that's fine, people  
12 have to make a living. But this man, with all the work  
13 he's doing, I submit to you that, yes, this is the first  
14 time, it won't be the last time, and they hate it.

15 Thank you.

16 THE COURT: Members of the jury, I have a  
17 question of law that I need to address in your absence, and  
18 so I'm going to ask you to return to the jury room and I'll  
19 call for you as soon as I'm ready.

20 You may file out.

21 (Jury out).

22 THE COURT: Now, before we brought the jury  
23 in, there was a discussion at the side-bar about the  
24 testimony of Dr. John Burke who apparently is the proposed  
25 next witness on behalf of the plaintiff.

1225

1 And the testimony is to be offered apparently  
2 in support of the proposition that these defendants can  
3 afford a punitive damage judgment in addition to a  
4 compensatory judgment, and that punitive damages are an  
5 appropriate remedy in this case.

6 I indicated to counsel the other day in a  
7 discussion that was not on the record, but I think all  
8 counsel were present, I pointed out to plaintiff's counsel  
9 that as of this moment, there still is nothing in the  
10 record to establish the proposition that the cigarettes  
11 that Mr. Tompkin smoked were in containers that failed to  
12 contain any warning.

13 And I indicated to counsel that I did not  
14 believe that that was anything I could take judicial notice  
15 of, and so as far as the record was concerned, at this  
16 point there is no -- there is no testimony, there is no  
17 stipulation to demonstrate that the cigarettes that  
18 Mr. Tompkin smoked during his lifetime were in containers  
19 that were absent any warning about the use of the  
20 cigarettes.

21 And I mentioned that because I have said  
22 right along that I was uncertain whether I would permit the  
23 issue of punitive damages to go to the jury. I wanted to  
24 hear what plaintiff's case was in support of punitive  
25 damages. And --

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1 MR. SMITH: Might I speak to that, Your  
2 Honor?

3 THE COURT: And at this point, at this point



4 I gather that the plaintiff's case for punitive damages is  
5 contained in those exhibits that I have permitted to be  
6 shown to Dr. Hoff when, in the fifties, the tobacco  
7 companies were stating that there was no known or proven  
8 link between tobacco smoking and lung cancer.

9 In making the best case for the plaintiff, I  
10 guess that's it. I'm curious as to what the plaintiff  
11 views its case to be that would support, in addition to a  
12 compensatory damage award, a punitive damage award.

13 And I raise that now because apparently the  
14 next witness's testimony would be limited solely to the  
15 issue of punitive damages, if the Court were to instruct  
16 them or send the issue of punitive damages to the jury.

17 Now, I'm searching the record for the  
18 evidence that would support punitive damages at this point,  
19 and the best I can come up with is that, quote, Frank  
20 statement that was contained in one of the ads that was  
21 displayed to Dr. Hoff.

22 Do you have anything in addition to that,  
23 counselor?

24 MR. SMITH: Yes, sir.

25 THE COURT: That's already before the Court,  
1227

1 now. Not something you expect to do; that's already before  
2 the Court.

3 MR. SMITH: Your Honor, I guess with respect  
4 to the warnings, I believe over the weekend a stipulation  
5 was entered into that there were no warnings on the packs  
6 or in the advertisements. I may stand corrected but --

7 MR. COFER: No, that's correct. We will  
8 stipulate.

9 THE COURT: Is that going to be in a written  
10 stipulation or oral stipulation?

11 MR. COFER: We will -- we will prepare a  
12 written stipulation so it's crystal clear, but the  
13 stipulation is that January 1st, 1966 was the first time  
14 that warnings went on the cigarette packs in this country.

15 MR. SMITH: Yeah.

16 THE COURT: And that will bind all  
17 defendants?

18 MR. COFER: That's correct.  
19 Anyone disagree?

20 MR. MILLIMAN: That binds American Tobacco  
21 Company.

22 MR. McLAUGHLIN: Yeah, Lorillard as well,  
23 Your Honor.

24 MR. WALSH: Yeah, Liggett as well, Your  
25 Honor.

1228

1 THE COURT: All right. So I do have that  
2 stipulation.

3 All right. Now, with that out of the way,  
4 now make your best case for why I should submit punitive  
5 damages.

6 MR. SMITH: Your Honor, we would request the  
7 Court to include in that the documents that we will be  
8 offering, the Court has seen in previous briefings,  
9 regarding TI and TIRC.

10 THE COURT: I can't -- I can't send the issue  
11 of punitive damages to the jury based on exhibits that  
12 don't go in the record, counselor. I can't do that.

13 MR. SMITH: Well, we will be offering those  
14 to go in the record.

15 THE COURT: Well, I don't know if I'm going  
16 to accept them.  
17 MR. SMITH: No, I understand. I understand  
18 that, Your Honor.  
19 And we can ask Dr. Burke to come back at a  
20 different time, but we do want to offer those. And as the  
21 Court knows, we have been trying to get them into evidence.  
22 There has been pretty serious briefing.  
23 THE COURT: Just tell me in your own words  
24 what's the best case for the proposition that the conduct  
25 of the defendant tobacco companies was so egregious that  
1229  
1 punitive damages should be an option that I should give to  
2 the jury in the event they find compensatory damages?  
3 MR. SMITH: I think we put it as a backdrop  
4 that first with regard to, without overdramatizing it which  
5 I believe we can easily do, the seriousness of the harm of  
6 this product and the frequency of the harm that it causes,  
7 that is a backdrop with a company who, with, if there was  
8 nothing else in the record, Your Honor, if there were  
9 nothing in the record other than the medical literature,  
10 and their failing to warn, we respectfully submit to the  
11 Court that that alone would be enough.  
12 In the face of that type of deadly  
13 information, deadly information, to do nothing, we submit  
14 would be sufficient for punitive damages to go to the jury.  
15 On top of that, there are other items out  
16 there. One of them is the mouse painting studies that  
17 American Tobacco did around 1953, that -- at the same time  
18 that the mouse painting studies were being done that lead  
19 to the Frank statement by others; I think Wynder's studies.  
20 In addition, Liggett did studies in '57 that  
21 showed tar, mouse tar or animal tar lead to tumors. And  
22 they withheld that for five years, until '62.  
23 THE COURT: Where is that in the record?  
24 MR. SMITH: It's not there yet, Your Honor,  
25 that is true.  
1230  
1 But the -- and then the Tobacco Institute and  
2 the Tobacco Industry Research Committee information that we  
3 have been providing to the Court in briefings, indicates  
4 that in 1953, American Tobacco calls the meeting. Within  
5 five -- with a telegram.  
6 Within five days everybody shows up in New  
7 York.  
8 THE COURT: Counselor, counselor.  
9 MR. SMITH: Yes, sir.  
10 THE COURT: If it's not in the record, I  
11 can't rely upon that.  
12 MR. SMITH: Then, well --  
13 THE COURT: When I say if it's not in the  
14 record, I mean the record of this trial.  
15 MR. SMITH: Well, Your Honor, we have  
16 been -- there was a motion in limine granted that we were  
17 not permitted to go into those items initially, and we -- I  
18 had believed the Court was changing -- was seeing things on  
19 the other side of that issue that was progressed.  
20 But we haven't been permitted to introduce it  
21 into evidence. We even tried to do it after Dr. Hoff's  
22 testimony the other day, and I would request leave to do it  
23 now.  
24 But I don't -- I certainly want to be in  
25 compliance with the Court's directive, and as long as the

1 motion in limine is in place, all we can ever do is proffer  
2 it at some point in time.

3 But I would like to get it to the jury, and  
4 that is our goal and our request.

5 And I understand the Court has to have it in  
6 evidence, but we think it's very powerful, Your Honor.  
7 We -- I -- we think it's tremendously powerful evidence and  
8 we think it's very relevant.

9 THE COURT: Well, I'll hear from -- I'll hear  
10 from defense counsel on their view as to whether or not the  
11 record justifies an instruction on punitive damages.

12 MR. PROCTOR: Thank you, Your Honor. Craig  
13 Proctor. If I could address that, and other defendants may  
14 join in after that, but I'd like to take a crack.

15 THE COURT: You are arguing on behalf of  
16 which defendant?

17 MR. PROCTOR: On behalf of Lorillard Tobacco  
18 Company, Your Honor.

19 THE COURT: All right.

20 MR. PROCTOR: Your Honor, the issue is can  
21 Dr. Burke testify about punitive issues.

22 THE COURT: The issue, should I allow him to.

23 MR. PROCTOR: And the issue is, we submit, is  
24 no -- the answer is no.

25 THE COURT: Because?

1 MR. PROCTOR: Because there is not a shred of  
2 evidence to support punitive damages, Your Honor.  
3 Everything Mr. Smith mentioned is not in the record.

4 He talked about mouse skin paintings studies,  
5 he talked about TIRC and CTR, none of that is in the  
6 record.

7 All we have right now, based upon the  
8 stipulation we gave, is that there was no warning on the  
9 cigarette packages. The only information, period, on the  
10 conduct of these defendants at this point in time is that  
11 the defendants made the products that Mr. Tompkin smoked,  
12 and that none of those products had a warning during the  
13 time he smoked.

14 The statute is clear from its face that  
15 merely having a defect in the product does not equate to  
16 having a submissible case on punitive damages. There is  
17 nothing in the record on that, your Honor. We submit at  
18 this point in time --

19 THE COURT: Have you briefed this?

20 MR. PROCTOR: The punitive damages issue?

21 THE COURT: Yes.

22 MR. PROCTOR: No, Your Honor, we have not.  
23 Although we do intend to do so at the appropriate time.

24 THE COURT: Well, the appropriate time is  
25 now. I have Dr. Burke out here.

1 Your view is that the Blum testimony is  
2 insufficient to -- that the jury could find that as early  
3 as 1939, that the science had developed to a point where  
4 the tobacco companies owed its customers the duty to warn  
5 them about the potential dangers of smoking cigarettes and  
6 the connection with lung cancer, you think that's not  
7 anything the jury can consider?

8 MR. PROCTOR: Your Honor, absolutely. That  
9 goes to the issue of the failure to warn claim itself.

10 Dr. Blum did put in evidence as to what the

11 state of science was that, in his opinion, triggered the  
12 duty to warn.  
13 He did not put in evidence of company conduct  
14 that, as a nexus back to that, that would establish the  
15 punitive damage elements.  
16 There are very strict criteria for punitive  
17 damages: Willful and wanton misconduct. And the statute  
18 on its face makes clear that merely having a defect in the  
19 product, such as the lack of a warning, does not get you to  
20 the punitive damages element.  
21 Otherwise, every single case in which no  
22 warning was issued would be a punitive damages case.  
23 That's not the standard. And Mr. Smith has not put  
24 evidence in the record to meet the standard.  
25 MR. COFER: Your Honor, may I address that

1234

1 briefly?  
2 THE COURT: Sure.  
3 MR. COFER: But what Dr. Blum testified, and  
4 I asked him two questions, he said in hindsight, looking  
5 backward, he believed that by 1939 there was sufficient  
6 evidence that, quote, the case was closed.  
7 He also conceded in his testimony that there  
8 was a controversy through 1964. Blum was saying with the  
9 benefit of what we know in 2001, that the case was closed  
10 in 1939.  
11 There is no evidence in the record that we  
12 should have known it by 1939. There, with respect to  
13 warnings, there is no evidence in the record that other  
14 manufacturers of other products in the thirties, forties,  
15 fifties and sixties, put warnings on their products.  
16 You know, today we have a warnings culture.  
17 If you look at McDonald's, you have warnings on hot coffee  
18 cups.  
19 There's no evidence in the record that the  
20 standard of care of reasonable manufacturers in the  
21 thirties, forties and fifties, included placing a warning  
22 on their product; and that by not doing so, not only did  
23 these defendants breach their duty, but they acted so  
24 egregiously that this jury should have an opportunity to  
25 punish them for conduct that happened over 30 to 50 years

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1 ago.  
2 It is a heightened standard to submit  
3 punitive damages. The burden is clearly on plaintiff to  
4 adduce sufficient evidence before the jury can consider it.  
5 And the problem, of course, is that once we  
6 let Burke put in evidence of the incredible financial worth  
7 of some of these companies, we know we run into  
8 significant 403 problems because what we have here is a  
9 woman who lost her husband. We have, I believe, stipulated  
10 or are prepared to stipulate that she has specials up to  
11 \$300,000. As the Court has correctly noted, we have never  
12 made an offer for settlement and there is a seven year  
13 pre-judgment interest issue as well.  
14 But then you tack onto that numbers in the  
15 hundreds and millions or billions, and the jury is tempted  
16 to say, well, these guys have lots of money and so let's  
17 just give them some.  
18 But before plaintiff is entitled to have that  
19 evidence submitted and before the jury is entitled to  
20 consider the appropriateness of punitive damages, there  
21 must be evidence that our conduct was so egregious compared

22 to the standard of other manufacturers at the time, and  
 23 there is none in the record.  
 24 Thank you.  
 25 THE COURT: Anybody else? 1236

1 MR. MILLIMAN: No, Your Honor.  
 2 THE COURT: Yeah, go ahead, Russ.  
 3 MR. SMITH: Thank you, Your Honor.  
 4 Defense counsel, may it please the Court.  
 5 Your Honor, the test in Ohio, we submit, is  
 6 the test that's set forth in Preston v. Murty, 32 Ohio  
 7 State 3d, 334. 32 Ohio State 3d 334, in 1987.  
 8 THE COURT: 334?  
 9 MR. SMITH: Yes, sir. 32 Ohio State 3d, Page  
 10 334.  
 11 THE COURT: Go ahead.  
 12 MR. SMITH: It's a 1987 case, and we submit  
 13 it's the law of Ohio and it is this: That evidence of a  
 14 conscious disregard for the rights and safety of other  
 15 persons, and a defendant's willingness to expose others to  
 16 the probability of substantial harm, establishes the malice  
 17 or conscious disregard necessary for punitive damages.  
 18 Now, in addition to all these articles coming  
 19 out, we have, I mean, to show their conscious disregard of  
 20 it for one example is the December 9th telegram and the  
 21 December 14th meeting.  
 22 Everybody's there except -- and who's in this  
 23 case except for Liggett. They are all concerned about  
 24 what's happening because of what's out there and what the  
 25 Wynder study is. I mean, there's no secret that they all  
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1 knew before. They had access to all that literature that  
 2 had been coming down.  
 3 They then, instead of going out and putting  
 4 on any kind of warning anywhere, they come out with the  
 5 Frank statement. And the Frank statement, they put the  
 6 statement out to the public, there is no -- I'm trying to,  
 7 I'm going to paraphrase it, Your Honor, but the words are  
 8 what they are, but they tell the public in that statement  
 9 that their products don't injure anyone, in the face of  
 10 that knowledge.  
 11 And they go on and refuse to warn.  
 12 And we submit, Your Honor, for the Court's  
 13 consideration, that is the conscious disregard for the  
 14 rights and safeties of others.  
 15 Now, they talk about, sure, that there could  
 16 be a substantial verdict. Your Honor --  
 17 THE COURT: What was the conscious disregard  
 18 of the case you cited to me? What were the facts of that  
 19 case?  
 20 MR. SMITH: I must confess, Your Honor, I  
 21 have known, but I don't know.  
 22 THE COURT: Okay. I'll go read it.  
 23 MR. SMITH: I apologize. Bryan may know.  
 24 Do you recall what it was?  
 25 THE COURT: I'll go read it. I can go get  
 1238

1 it.  
 2 MR. SMITH: Oh. There is no doubt about it,  
 3 I mean there is a potential for a large verdict, and we  
 4 submit that's what these verdicts are for. When they start  
 5 comparing what other tobacco companies would do and they  
 6 all show up at this meeting, and that is compounded with

7 the fact really, Your Honor, as we look at it, in these  
8 types of cases with tobacco, I think this -- I believe this  
9 is the first tobacco case to go to trial in this state, may  
10 not -- may have been another one. I don't know.

11 The Court knows it's going to be difficult  
12 for many cases to get through the legislative -- the  
13 statute. It is a chance for Ohio to say something to them.  
14 And you know the case is about more than money. I spoke to  
15 my client with the thought that, you know, if there is a  
16 big verdict, you might have a less chance of holding it.  
17 She's willing to take the chance, Your Honor.

18 This, these cases, with what is at stake,  
19 what these people are doing, there is no legislation, they  
20 come in and say it's a legal product.

21 There is no way to ever straighten them out  
22 with legislation. It's Courts. This is an issue that if  
23 there is anyone going to solve it within the realm of law,  
24 we submit it's Courts.

25 And that's our thoughts, Your Honor.

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1 THE COURT: In the Ford Bronco rollover case  
2 that wound up in a compensatory judgment for the decedents  
3 and their estates, I allowed punitive damages to go to the  
4 jury, but I did it based on the overwhelming proof that was  
5 demonstrated from the Ford's own records that it was really  
6 aware of the rollover problem and ignored it.

7 And that's why they lost the case, frankly.  
8 And I allowed punitive damages to go to the jury, and the  
9 jury said, no, they did not -- did not add punitive damages  
10 to the compensatory, so I didn't get any guidance from the  
11 Circuit.

12 We will be in brief recess. I'll go read  
13 your case and then I'll come back and make my ruling.

14 MR. SMITH: And, Your Honor, there is one  
15 thought for the Court: If we are permitted to put the  
16 documents in, we would respectfully request that --

17 THE COURT: Counselor, I'm not going to  
18 consider any documents coming into the record absent a  
19 witness justifying the documents and indicating why they  
20 are relevant.

21 MR. SMITH: And I would like --

22 THE COURT: This is not a forum that is open  
23 to the question of what did the tobacco companies do. This  
24 is a lawsuit brought by your client claiming that her  
25 husband died as a wrongful death based upon the product

1240

1 liability conduct of the defendants, but it's not a -- it's  
2 not a forum for just general discussion of the way the  
3 tobacco companies have conducted themselves.

4 This is a -- this is a single lawsuit devoted  
5 to the facts in this case, but it's not just an open forum  
6 to throw everything into the record without the benefit of  
7 a witness.

8 MR. SMITH: Your Honor, we would request that  
9 Attorney Bryan Nace be the witness to establish where they  
10 came from, and the Court could pass upon whether or not  
11 they were relevant before the jury saw them.

12 But we think it would satisfy the Court once  
13 the Court hears the documents. That's our honest belief.

14 THE COURT: Court will be in recess.

15 (Recess taken).

16 THE COURT: Please be seated.

17 The issue before the Court, given the desire

18 of the plaintiff to next present the testimony of Dr.  
19 John A. Burke who is an economist and who is prepared to  
20 testify as to the value of the -- at least three of the  
21 four defendant tobacco companies, presupposes that the  
22 Court will submit to the jury the issue of punitive  
23 damages.

24 Counsel for the plaintiff cited to the Court  
25 the case of Preston versus Murty, et al., which is found at  
1241

1 32 Ohio State 3d, Page 334. It's a 1987 opinion written by  
2 the chief justice, Tom Moyer.

3 The syllabus, which is the law of the case,  
4 reads, "Actual malice, necessary for an award of punitive  
5 damages, is, one, that state of mind under which a person's  
6 conduct is characterized by hatred, ill will or a spirit of  
7 revenge or, two, a conscious disregard for the rights and  
8 safety of other persons that has a great probability of  
9 causing substantial harm."

10 I inquired about the facts in the case, and  
11 they are set forth in the opinion that reads: "On  
12 July 12th, 1982, a part-time sales clerk for a Gold Circle  
13 discount store, located in Akron, Ohio, sold an air gun and  
14 beebees to two 12 year old boys. This sale was in  
15 violation of an Akron ordinance which prohibited the sale  
16 of air guns and ammunition for these guns to any person  
17 under the age of 18. The boys Timothy Murty and Barry  
18 Smith were playing with the gun, and Murty accidentally  
19 shot a seven year old boy, Marshal Preston. A beebee  
20 lodged in Preston's body, where it still remains.

21 "Preston and his mother brought suit for his  
22 personal injuries against Murty, Smith and others and Gold  
23 Circle. The claim against the Smiths was settled and the  
24 remaining claims proceeded to trial.

25 "During the trial, the Court directed a  
1242  
1 verdict in favor of Murty and his mother. The jury awarded  
2 Preston and his mother compensatory damages of \$56,667.16  
3 from Murty, from Gold Circle and awarded Preston \$100,000  
4 in punitive damages from Gold Circle. The appeal dealt  
5 with the Court of Appeal's affirmance of the award for  
6 punitive damages.

7 "Chief Justice Moyer writes against the  
8 backdrop that there was precious little law in Ohio to  
9 guide Judges with respect to allowing punitive damages  
10 other than to say Ohio Courts, since as early as 1859, have  
11 allowed punitive damages to be awarded in tort actions  
12 which involve fraud, malice or insult.

13 "The Court quickly set aside any idea that  
14 fraud was involved and focused on malice, and concluded,  
15 'We, therefore, hold that actual malice necessary for an  
16 award of punitive damages is, one, that state of mind under  
17 which a person's conduct is characterized by hatred, ill  
18 will or a spirit of revenge or, two, a conscious disregard  
19 for the rights and safety of other persons that has a great  
20 probability of causing substantial harm.'

21 "In the latter case, before submitting the  
22 case -- the issue of punitive damages to the jury, a trial  
23 Court must review the evidence to determine if reasonable  
24 minds can differ as to whether the party was aware of his  
25 or -- was aware that his or her act had a great probability

1243  
1 of causing substantial harm. Furthermore, the Court must  
2 determine that sufficient evidence is presented revealing

3 that the party consciously disregarded the injured party's  
4 rights or safety. If submitted to the jury, the trial  
5 Court should give an instruction in accordance with the law  
6 we announce today."  
7 Then the Court reversed and set aside the  
8 hundred thousand dollar punitive damage award.  
9 Now, following that decision, and applying  
10 the syllabus to this case, and considering the language of  
11 Judge Moyer's decision, the Court finds that the record at  
12 this moment is insufficient to justify presenting an issue  
13 of punitive damages to the jury. Therefore, the Court will  
14 not hear Dr. Burke's testimony at this time.  
15 Are you prepared with other witnesses?  
16 MR. SMITH: Yes, sir.  
17 THE COURT: All right. Are you ready to go?  
18 MS. CHAPMAN: Your Honor, if it would assist  
19 the Court.  
20 THE COURT: We have a second problem, before  
21 we proceed.  
22 That has to do with tomorrow's proposed video  
23 of Dr. Feingold, the witness in, where, New York?  
24 MR. SMITH: Florida, yes, sir.  
25 THE COURT: Florida, right.

1244

1 Now, I understand that we gave some  
2 indication to counsel on Friday what was necessary in order  
3 to bring this off.  
4 THE CLERK: Yes.  
5 THE COURT: Chris, could you help me with  
6 this?  
7 THE CLERK: As I had mentioned --  
8 THE COURT: Chris is my courtroom deputy.  
9 THE CLERK: -- we have only three locations  
10 we can do video conference in this courthouse: Judge  
11 Gwin's courtroom, which he currently is having a jury trial  
12 right now so his courtroom will be unavailable at 9:00 a.m.  
13 tomorrow morning. If I knew ahead of time, then I can  
14 schedule something with him at his lunch or something like  
15 that.  
16 Judge Polster's conference room we can use,  
17 but obviously we will have the jury there, plus all  
18 counsel. And it's not very big.  
19 Or the Clerk's Office lunch room. Those are  
20 the only three locations.  
21 Plus I would need a phone number, hopefully  
22 the day prior to. And a test set up at the other site so  
23 we could do a test call approximately at least a half hour  
24 before because there's always problems, you know, that have  
25 to be worked out, so video and audio both work.

1245

1 So if we are going to do it in the courtroom  
2 of Judge Gwin's, we will have to wait.  
3 THE COURT: We will not do it in Judge Gwin's  
4 courtroom. I'm not going to even ask him for that.  
5 I suppose we will use the lunch room. Can we  
6 get -- how many people can we get in the lunch room? Not  
7 very many, can we?  
8 THE CLERK: I'm wondering if Judge Polster's  
9 conference room is even larger.  
10 THE COURT: It's probably even larger, but  
11 what I'm concerned about is what's going on at the other  
12 end because all we can be concerned about is what's coming  
13 up from the other end, and we are not responsible for that



14 in any way, shape or form.  
15 So I don't know how far along you are in the  
16 planning or whether it's ready to go or isn't ready to go.  
17 But what we will do is supply either Judge  
18 Polster's room or the lunch room. The lunch room will  
19 really be tight because it's not that large. It's kind of  
20 like a bowling alley, a short bowling alley.  
21 So plaintiff's counsel ought to be helping my  
22 courtroom deputy Chris.  
23 MR. SMITH: Yes, sir.  
24 THE COURT: To know what's going on so we can  
25 help.

1246

1 But don't rely upon us to have anything to do  
2 at all with the other end. That's plaintiff's counsel's  
3 responsibility.  
4 And I assume, I gather the idea is that this  
5 person will be available on film, you will engage in a  
6 direct examination on the spot, and then the lawyers will  
7 have the opportunity to cross-examine.  
8 MR. SMITH: Yes, sir.  
9 THE COURT: And this witness, so it will be a  
10 live video presentation.  
11 And I gather the defendants have no objection  
12 to that scenario, if, in fact, it can be mechanically  
13 arranged.  
14 MR. COFER: Well, we have no objection to it  
15 in theory.  
16 However, I would want to make sure that we  
17 had sufficient safeguards, we knew what was going on.  
18 For example, typically when Dr. Feingold  
19 testifies by deposition, what he has tried to do -- and  
20 some Courts have let him and some have not in court -- he  
21 has a computer in front of him, and he can frequently  
22 refer to the computer for responses, for answers. I guess  
23 it's akin to have your file except in electronic format.  
24 If Dr. Feingold were here, I would object to  
25 him taking a computer to the stand because I would have no

1247

1 idea what was on it.  
2 If, in fact, this was going to occur with  
3 Feingold in Miami, I need to know when and where because I  
4 want to have a lawyer there sitting watching making sure  
5 that everything is going as it should.  
6 And while we talked about this in theory last  
7 Friday, this is the first I've heard about it in practice.  
8 Although, no, Russ, did say we will try to get Feingold in  
9 or might try to get him in on Tuesday.  
10 THE COURT: What's so magical about 9:00  
11 o'clock?  
12 MR. SMITH: It isn't magic, Your Honor. It  
13 is not magic.  
14 THE COURT: Well, somebody has to be working  
15 on it this afternoon so that I can -- so you can inform the  
16 Court what's going on so the defense counsel knows, knows  
17 what's going on and can have the person present on the  
18 scene for the video, as I understand defendants are asking.  
19 Seems to me like it's a legitimate request,  
20 especially if there is a history of the witness somehow  
21 referring to his computer before he answers the question.  
22 It's one thing to have notes there, but a  
23 computer, I've never heard, nor seen that before.  
24 MR. SMITH: I know he did it in a deposition,

25 Your Honor. And I'll instruct him to do whatever -- 1248

1 THE COURT: Well, is somebody going to get  
2 ahold of him and find out what times he's available?  
3 MR. SMITH: I have done that, and my  
4 secretary is trying to line up the mechanics from the  
5 Miami, Florida area.  
6 THE CLERK: Calling down there?  
7 THE COURT: Well, when we take the next  
8 recess, call your secretary and find out what's going on.  
9 MR. SMITH: Yes, sir.  
10 THE COURT: Are we ready to proceed with live  
11 testimony?  
12 MR. SMITH: Yes, your Honor.  
13 MS. CHAPMAN: Your Honor, if it would be  
14 helpful, we renew our offer to Mr. Smith on compensatories.  
15 We would stipulate to Dr. Burke's report, but if he  
16 wants --  
17 MR. SMITH: I'll tell you what --  
18 THE COURT: I don't see how his report -- he  
19 has a report on compensatories?  
20 MS. CHAPMAN: It's an October, 1997 report,  
21 Judge, wholly separate from the one I handed to the Court  
22 earlier.  
23 THE COURT: If you want to put Burke on for  
24 compensatories, that's fine.  
25 MR. SMITH: What I want, with the Court's 1249

1 permission, I was going to call Bryan Nace to the stand for  
2 these articles that he located.  
3 THE COURT: Oh, I'm -- I assume there is  
4 going to be objection?  
5 MR. McLAUGHLIN: Absolutely. Absolutely.  
6 MR. SMITH: Would the Court be willing to at  
7 least voir dire him out of the presence of the jury if  
8 that's -- I mean, we have the articles. They have been  
9 obtained. And he can identify them. We trust the Court's  
10 judgment on relevancy.  
11 THE COURT: Well, in the interests of time,  
12 why don't you put together kind of a mini trial brief and  
13 tell me what he's going -- what the exhibits are that he  
14 would wish to offer, and then I'll hear the defendants out,  
15 if they wish to continue the objection or wish to stipulate  
16 to them.  
17 But it's very unseemly to call a lawyer  
18 that's participating in the case as a witness. I mean,  
19 that's -- that is basically a no-no.  
20 MR. COFER: Well, to the extent there are any  
21 credibility issues, I would move to disqualify plaintiff's  
22 counsel because you can't be both a witness and an  
23 adversary to the Court.  
24 THE COURT: That's pretty clear, Mr. Smith,  
25 so we have a real problem with that process. 1250

1 MR. SMITH: Your Honor, what he would be  
2 doing would be identifying what he obtained and where it  
3 came from. And everybody knows.  
4 THE COURT: His credibility is at issue.  
5 If they want to challenge his -- the truth of  
6 his testimony, they are allowed to do that.  
7 MR. SMITH: I, Your Honor, it's -- they are  
8 on the Internet, these documents are. It's not a -- not  
9 difficult to locate them. I mean, I'm not going to say it

10 isn't difficult, but they are readily verifiable.  
11 THE COURT: Why don't you follow my  
12 suggestion, give me a scenario of what you want to have  
13 presented, and maybe we can get a stipulation? And  
14 possibly there won't be, and possibly you can make a  
15 proffer, and if I rule against it, at least there would be  
16 in the record what you attempted to do.  
17 MR. SMITH: Yes, sir.  
18 THE COURT: So you can protect your record in  
19 that fashion.  
20 MR. COFER: Absolutely.  
21 MR. SMITH: Your Honor, one other thing I  
22 would submit to the Court was when the Court asked us for  
23 the case law and we gave the Court the syllabus, there are  
24 other cases since then that are contained in that brief  
25 that we would ask the Court to consider.

1251

1 THE COURT: Well, I've read that pretty  
2 carefully, and really what it does is conform pretty much  
3 with what I had already tentatively concluded, but I  
4 thought I would read the case for your benefit.  
5 But I am following the law in the State of  
6 Ohio. This is a case where the Supreme Court jurisprudence  
7 is important.  
8 And I know from personal experience -- I used  
9 to fight over syllabi -- and the short time I was on that  
10 Court, that's the syllabus and that's the law of the case.  
11 But you can read the opinion against the syllabus to get a  
12 little better feel for what they are talking about, and I  
13 don't think that you meet that test in this case.  
14 And if you should prevail in this case and  
15 have an award of compensatory damages, and if the defendant  
16 appeals, you can file a cross appeal and say I should have  
17 given punitive damages. If you lose on compensatory,  
18 punitive damages are irrelevant anyhow.  
19 But you certainly have the avenue available  
20 to file a cross appeal, if they win, and you file a  
21 compensatory damage appeal.  
22 MR. SMITH: I want to say two things.  
23 There are cases that applied that, one to an  
24 asbestos case, and we haven't given up what we have  
25 provided to the Court that the Court may consider.

1252

1 THE COURT: Very well. Do we have a witness  
2 ready to produce now?  
3 MR. COFER: With the Court's permission, I  
4 will step out for one second to see if I can line up a  
5 lawyer in Miami if tomorrow comes off.  
6 THE COURT: Good.  
7 MR. SMITH: Maybe we can have him read the  
8 number real quick, stipulate to his qualifications and we  
9 can do it in a matter of three minutes.  
10 THE COURT: Whatever you want to do. I'm  
11 just here trying to call balls and strikes.  
12 MR. McLAUGHLIN: Right, Your Honor.  
13 MR. SMITH: Pardon me, Your Honor?  
14 THE COURT: I'm doing my best to call balls  
15 and strikes. Do whatever you want to do.  
16 MR. SMITH: It's those foul balls.  
17 (Pause).  
18 THE COURT: Are we ready to go?  
19 MR. SMITH: Yes.  
20 THE COURT: Bring the jury in, please.

21 MR. SMITH: Could we say one thing to the  
22 Court?  
23 In trying to work out Feingold and the TI  
24 stuff, we have -- after Dr. Burke, we have Jocelyn,  
25 Mrs. Tompkin.

1253

Burke - Direct

1 If Dr. Burke is not able to get in, he's out  
2 of state, his brother Gary.  
3 THE COURT: Who is out of state?  
4 MR. SMITH: The decedent's brother.  
5 Then we have some deposition testimony we are  
6 trying to read, as the Court is aware of. We are pretty  
7 close.  
8 (Discussion had off the record).  
9 (Jury in).  
10 THE COURT: Please be seated.  
11 Please call your next witness.  
12 MR. SMITH: Dr. John Burke, Your Honor.  
13 THE COURT: Please come forward.  
14 JOHN BURKE,  
15 of lawful age, a witness called by the Plaintiff,  
16 being first duly sworn, was examined  
17 and testified as follows:  
18 DIRECT EXAMINATION OF JOHN BURKE  
19 BY MR. SMITH:  
20 Q. Will you state your name, please, sir?  
21 A. Yes, sir. My name is John F. Burke, Jr.  
22 Q. And your occupation?  
23 A. I'm an economist.  
24 Q. And your degree?  
25 A. I received my undergraduate degree from Boston

1254

Burke - Direct

1 College in 1961, majoring in economics.  
2 I then got a scholarship to go to the  
3 University of Notre Dame in South Bend, Indiana. Got a  
4 Master's degree from Notre Dame in 1963 and a Ph.D. from  
5 Notre Dame, Doctor of Philosophy in economics, in 1967.  
6 Did some post-doctoral work at the University  
7 of Chicago in the summer of 1967, but there was no degree  
8 associated with that program at Chicago.  
9 That's my formal education. I'm still a  
10 student of economics, I'm still learning.  
11 Q. Dr. Burke, and you wouldn't be Irish, would you,  
12 Dr. Burke?  
13 A. I am Irish.  
14 Q. Dr. Burke, have you also taught in college in  
15 Cleveland?  
16 A. Yes, sir. I've taught in Cleveland. I spent 27  
17 years at Cleveland State University having previously  
18 taught at Notre Dame as a TA and also at Indiana University  
19 as an instructor, and Eastern Illinois University as an  
20 assistant professor.  
21 I retired from teaching January 1st, 1994  
22 with the equivalent of 36 years of public service. They  
23 let you buy your military and other times like that.  
24 I was out of the classroom for four or five  
25 years, but then a couple of years ago John Carroll

1255

Burke - Direct

1 University called. I find myself back in the classroom  
2 again. I'm an adjunct professor, and this time it's

3 perfect: I teach my classes, I meet with the students. I  
4 attend no faculty meetings.  
5 Q. Dr. Burke, I'm going to do what I really don't want  
6 to do, but because of the clock I'll cut to the chase.  
7 Sir, did I ask you to determine a loss of  
8 future earning capacity for David Tompkin?  
9 A. You did.  
10 Q. And, Dr. Burke, based upon your education and  
11 experience and your investigation of the records of David  
12 Tompkin, did you arrive at a figure for the loss of his  
13 future earning capacity and do you have one that would be  
14 adjusted to this date?  
15 A. I do.  
16 Q. And what is that figure, sir?  
17 A. If he had worked until the age of 65, then the amount  
18 of earnings that he could have earned during that time  
19 period from age 61 to age 65, including a small amount of  
20 fringe benefits, would be about \$99,315.  
21 All of that would now be in the past, because  
22 he was born in 1960 -- 1934 so he would achieve age 65  
23 already. If he worked through a statistical work life  
24 expectancy, which would give him about another year and a  
25 half's worth of work, that would bring the figure up to

1256

Burke - Direct

1 about \$129,143, and that would be his net earnings; wages,  
2 fringe benefits, minus that portion of his income that he  
3 would have spent on himself.  
4 Q. It's my understanding he indicated that he wanted to  
5 retire from his work as a bricklayer at age 65 and then he  
6 was going to attempt to build houses and sell them.  
7 And I think, is -- that last feature probably  
8 is not included, would not be included in your report, or  
9 would it?  
10 A. That's correct, it is not. That is only the income  
11 as a bricklayer, that job that he had performed in the  
12 past.  
13 Q. And if he did that up to age 65, the number would be  
14 \$99,315?  
15 A. Yes. Wages, plus fringe benefits, minus that portion  
16 of his wages that he would spend on himself, his own food,  
17 his own clothing, his own tickets to the movies, things like  
18 that.  
19 Q. Dr. Burke, did we also ask you to compute how much of  
20 that money would be expected for him to spend on his own  
21 personal consumption?  
22 A. Yes, sir.  
23 Q. And that amount would be what, sir?  
24 A. The figure I gave you is net of that amount, but that  
25 amount, just by itself, would be about \$46,483.

1257

Burke - Direct

1 Q. And the number from which that was deducted was what?  
2 A. That would be an earning capacity for the wages and  
3 the fringe benefits of about \$145,799.  
4 Q. So what you did was you came up with the 145 as what  
5 he would earn, subtracted his personal consumption, and  
6 arrived at what would be available for his family as the  
7 bottom number is \$99,315?  
8 A. Yes, sir.  
9 Q. And, Dr. Burke, did you also compute the value that  
10 he would have as, if we looked at him as a -- if we just  
11 looked at his financial contribution to the family as far

12 as what he did around the house, as to what that would be  
13 worth?  
14 A. The financial contribution to the family from work  
15 outside the house, that would be the figure of \$99,315.  
16 The contribution that he would make around  
17 the house as somebody who did the various jobs that there  
18 are around the house, cut the grass, shovel the snow or see  
19 that the grass is cut or see that the snow is shoveled,  
20 take out the garbage, change a lightbulb, perhaps do some  
21 cooking, cleaning, it varies from house to house, but if he  
22 did around ten hours of work per week, that would have a  
23 value of about \$121,106 as the replacement cost.  
24 Now, a lot of that would extend into the  
25 future, because Mr. Tompkin's life expectancy, if he had

1258

Burke - Direct

1 the life expectancy of the typical American male,  
2 Caucasian, age 61, would have been another 18.2 years. And  
3 that's, that's all of us who are -- fit those  
4 characteristics, American, male, Caucasian, 61, would be up  
5 to the year 2014.

6 So for these years in the future, I brought  
7 it back to what it was worth today, and that would be  
8 \$121,106.

9 Q. And that figure, if I were to ask you this,  
10 Dr. Burke, if David Tompkin was a man who did brick work  
11 around his home, who built wooden items, would that put him  
12 at least within the range of what the average male would  
13 provide around the home?

14 A. Yes, sir. I assume ten hours per week, and that is  
15 an average, and some of us are below that average and other  
16 people are above that average.

17 But it's all the tasks and the chores that  
18 have to be done. I say it varies from household to  
19 household how the jobs are split up.

20 It also changes over a period of time. You  
21 do one thing when your kids are toddlers and another thing  
22 when they are playing little league baseball, and a third  
23 thing when they are teenagers. So the job changes over a  
24 period of time.

25 But there's always these tasks and jobs that  
1259

Burke - Direct

1 have to be done around the house, and somebody has to do  
2 them, take out the garbage, change a few lightbulbs, do  
3 some cooking, do some food shopping, drop things off, pick  
4 them up at the dry cleaner. I assume that would take ten  
5 hours a week.

6 And that would be for a person who is a  
7 worker, somebody who's got a job outside the home at 40  
8 hours a week.

9 Once you retire from the work force, you tend  
10 to do more around the house, but I kept it at ten hours per  
11 week. But that's a base line.

12 If the people who knew Mr. Tompkin testified  
13 that he only did five, then you should cut my figure in  
14 half. And if the people that knew him testified that he  
15 did ten, you should use my figure. And if they say he did  
16 20, you should double my figure.

17 My figure is a base line.

18 Q. Okay. And are your opinions based today upon  
19 reasonable certainty within the discipline of economics?

20 A. Yes, sir.

21 MR. SMITH: Thank you very much.  
22 Nothing further, Your Honor.  
23 MS. CHAPMAN: Your Honor, however charming  
24 and engaging it's been in the past to engage in dialogue  
25 with Dr. Burke, we have no questions at this time.

1260

Burke - Direct  
1 Thank you, Dr. Burke.  
2 THE COURT: Dr. Burke, you are excused.  
3 Thank you.  
4 THE WITNESS: Thank you very much, Your  
5 Honor.  
6 THE COURT: Nice to see you.  
7 THE WITNESS: Nice to see you again, too.  
8 THE COURT: May I see counsel at the bench,  
9 please? I don't need the reporter.  
10 (Side-bar conference had off the record).  
11 MR. COFER: Are you going to use the screen,  
12 Bryan? Need the screen?  
13 MR. NACE: Yes.  
14 THE COURT: Please call your next witness.  
15 MR. NACE: Plaintiff calls Jocelyn Tompkin,  
16 Your Honor.  
17 THE COURT: Very well.  
18 JOCELYN TOMPKIN,  
19 of lawful age, a plaintiff herein,  
20 being first duly sworn, was examined  
21 and testified as follows:  
22 DIRECT EXAMINATION OF JOCELYN TOMPKIN  
23 BY MR. NACE:  
24 Q. Would you state your name, please?  
25 A. It's Jocelyn Tompkin.

1261

J. Tompkin - Direct  
1 Q. And can you tell us whether you've ever been married?  
2 A. I've been married once.  
3 Q. And to whom were you married?  
4 A. David Tompkin.  
5 Q. When did you first meet?  
6 A. I met David at a small party that a friend of mine  
7 had at her boyfriend's house.  
8 Q. About how old were you?  
9 A. I was 16.  
10 Q. And how old was he?  
11 A. Eighteen, almost 18.  
12 Q. And subsequent to that, you got married.  
13 Did you -- could you tell us whether you had  
14 any children?  
15 A. I had -- we had three girls. Deborah was the oldest  
16 and then Denise and then Donna. Two granddaughters,  
17 Christine and Sarah.  
18 Q. And how old are your granddaughters?  
19 A. Christine is 19, Sarah is 16.  
20 Q. And which -- which daughter --  
21 A. Oh, they are Debbie's two girls, Deb and Mitch's.  
22 Q. What types of things did you and Mr. Tompkin and the  
23 family like to do together?  
24 What were the type of activities?  
25 A. Traveling. My husband always said he liked to travel

1262

J. Tompkin - Direct  
1 with our daughters because there were never any problems.  
2 We have a cottage, we used to go down there

3 every weekend in the summer from the time my youngest  
4 daughter was about two. Took us years to fix it up, but  
5 the kids had a ball down there.  
6 Q. When you say it took years to fix it up, when you got  
7 it, what was it like?  
8 A. My kids were afraid to go in it, the house, when we  
9 first bought it. It was inhabited by squirrels and  
10 chipmunks for, like, five years before we bought it. So it  
11 was in pretty bad shape.  
12 Q. About what year was that that you bought it?  
13 A. Oh, let's see. Donna was two, 1966. About '68, '69.  
14 Q. And did Mr. Tompkin and yourself do the work on the  
15 cottage?  
16 A. Basically we did. He did most of it, although I did  
17 help him put a roof on the kitchen, help him with some  
18 other things.  
19 But he traded labor with some other guys.  
20 Like, another carpenter, he would come in and help him,  
21 Dave would go down, help him do some brick work.  
22 But we always traded labor. He didn't pay  
23 anybody. It was traded labor.  
24 But it took us, like, 15 years, almost 20  
25 years to get the house in the shape we wanted it because

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J. Tompkin - Direct

1 the house was built in 1892, so it was pretty old.  
2 Q. Yeah, I would say so.  
3 And how often would you go to the cottage?  
4 A. We would start going to the cottage about the end of  
5 April because it was too cold down there before that, and  
6 then our last times we would go would be usually about the  
7 middle of October because it just got too cold.  
8 The house was down in, like, a hollow and the  
9 floors got awfully cold. No basement or nothing under it.  
10 Q. What types of things did you do down at the cottage  
11 other than fix it up?  
12 A. Huh?  
13 Q. Other than fix it up.  
14 A. Oh, other than fix it up.  
15 The girls had swimming, they went boating,  
16 fishing, went on hikes, had picnics out in the woods.  
17 On Friday and Saturday nights, we would have  
18 a campfire and a lot of the kids would come down, play hide  
19 and seek. We would have hot dogs, smores, this type of  
20 thing.  
21 Also just throwing this in, our house was  
22 known when there is a tornado in the area, everybody headed  
23 for our place because they figured it was the oldest and  
24 would stay there.  
25 Q. Was yours the most solid one in the neighborhood, is

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J. Tompkin - Direct

1 that --  
2 A. Yes.  
3 Q. You also mentioned other travel, I believe, some  
4 other vacations.  
5 What other type of vacations?  
6 A. We went to Florida with them, went to Niagara Falls.  
7 Williamsburg, Busch Gardens, Disney World, this type of  
8 thing.  
9 Q. Any of those particular places that Mr. Tompkin  
10 enjoyed?  
11 A. He enjoyed Williamsburg, I think, the best of any of



12       them because he took his camera along. He was interested  
13       in colonial fireplaces so he would take his camera along to  
14       take pictures, and he enjoyed that every place there was,  
15       you know, old brick work or something. That's what he was  
16       looking for.

17       Q.       And around the -- around your home here, what types  
18       of things did you enjoy doing?

19       A.       You mean in way of entertainment or work on the  
20       house?

21       Q.       Well, both, I suppose.

22       A.       Okay. Working on the house when we bought it, he  
23       decided to add on a family room with a fireplace because at  
24       that time the City wouldn't let us put it on the regular  
25       house so we had to build a room on to put it in. Put brick

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J. Tompkin - Direct

1       walls in the backyard; built a garage that was block and  
2       brick; and bricked half of the front of the house. Pretty  
3       busy.

4               That took us 15 years because we were also  
5       fixing up the cottage at the same time, so that kind of  
6       meshed.

7               Around here, we would go to movies, play  
8       cards with the kids after supper. My kids always wanted to  
9       go down to Marietta to see the river boats and that. Went  
10       down to Fenton Ware, they would like to go there, and  
11       Cambridge. My kids were great collectors of glassware,  
12       which my husband started them on, so we were always looking  
13       for glassware.

14       Q.       Could you tell us the types of things that you would  
15       like to do for the holidays?

16       A.       We always had a big get together for Thanksgiving,  
17       Christmas, Easter, usually at our house.

18               We would have all the girls come in, the two  
19       grandkids come in, my mom and dad, his mom and dad. It  
20       just seemed everybody gravitated to our house.

21       Q.       And this, this house was where?

22       A.       In Cuyahoga Falls on Hayes Avenue.

23       Q.       Do you still live there?

24       A.       No, I don't. I live in a condo now.

25       Q.       We've heard a little bit about the types of things

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J. Tompkin - Direct

1       that you were doing together.

2               It sounds like there was a lot of work being  
3       done on both these places, but what other types of things  
4       did Mr. Tompkin like to do himself that he enjoyed?

5       A.       He liked to go fishing, especially fishing.

6               In, I would say, in the late eighties he  
7       decided he would take up woodworking. Why, I don't know.  
8       But he thought he would like to give it a shot, so that's  
9       when he took up woodworking. He always said that that was  
10       a lot more precise than brick work, so he had to have a lot  
11       of patience. Taught him some patience finally.

12               He did small furniture like end tables,  
13       coffee tables, wood boxes, little clocks, some --

14       Q.       With the Court's permission, I have a few items I  
15       would like to show you and the jury.

16       A.       I believe that one's a music box. I'm not sure.

17       Q.       Yes. If you could tell us, tell us what this is.

18       A.       I think it is. I'm not positive, but I think it is.

19               This is Donna Jean's, by the way. Yeah, this  
20       is one where you punch a button and it's a small music box.

21 It's not too bad for a bricklayer.  
22 Q. And how about this one?  
23 A. This is what he considers a miniature mantel clock.  
24 The battery is dead right now, and you have to take it all  
25 apart to put the battery in so I haven't changed the

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J. Tompkin - Direct

1 battery lately, but it's called a small miniature mantel  
2 clock.  
3 Q. I have one other one here.  
4 Could you tell us about this one?  
5 A. Yeah, this is definitely -- let me see. Yeah, this  
6 is definitely a music box.  
7 This was one of the hardest ones he made  
8 because he could not get the angles figured out even by  
9 using mathematics and stuff. He just more or less had to  
10 just keep trying them to get them altogether.  
11 But this was close to one of the last ones he  
12 made was like this, because from then on he just  
13 didn't -- couldn't concentrate so.  
14 MR. NACE: And, Your Honor, if I may, I'd  
15 like to project some pictures on the screen.  
16 THE COURT: Certainly.  
17 MR. SMITH: Exhibit 7277, Your Honor.

18 BY MR. NACE:

19 Q. We are showing you Exhibit 7277.  
20 Could you tell us what this is?  
21 A. That was our wedding day, August 27th, 1955. And it  
22 was taken about 3:00, 4:00 o'clock in the afternoon at my  
23 mother's house. We had the reception at my mother's, about  
24 125 people.  
25 As you can see, we were very young. I was

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J. Tompkin - Direct

1 only 18. My husband was only 20.  
2 Q. What was the date?  
3 A. August 27th, 1955.  
4 Q. Thanks.  
5 MR. SMITH: Your Honor, this is 7272.  
6 Q. And could you tell us what --  
7 MR. SMITH: If I get it in the right place.  
8 Q. -- Exhibit 7272 is, please?  
9 A. That was our house on Hayes Avenue in Cuyahoga Falls,  
10 and that's the brick work and the half roof and the steps  
11 and everything that he put in there. And the planter,  
12 also.  
13 That looks like it was taken in, yeah, the  
14 winter time.  
15 Q. Does look cold.  
16 A. I've got a wreath on the front door so it must have  
17 been right before Christmas.  
18 Q. This is 7275.  
19 Could you tell us what this depicts?  
20 A. Yes. It's on a cruise.  
21 I can't remember if it was either the first  
22 one. Does it show at the bottom, please?  
23 Q. Actually I think it does.  
24 A. It's right at the bottom, it should be.  
25 Is that the Cunard Princess?

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J. Tompkin - Direct

1 Q. Yes.  
2 A. Yeah, that was the first, first cruise we went on for

3 our 25th anniversary. That would have been in February.  
4 You figure 25 from -- 25 and 55 is what, 80? That would  
5 have been '81.  
6 Q. I think on the bottom it --  
7 A. Does it say that on the bottom? Okay. That would  
8 have been February of '81.  
9 Q. Is that another activity that you and Mr. Tompkin  
10 enjoyed?  
11 A. Yeah. Yeah. Altogether we went on four cruises  
12 together.  
13 He originally wanted to go to the sea and  
14 then he changed his mind, so I guess that's why he liked  
15 the cruises.  
16 Q. When you say he originally wanted to go to sea, what  
17 do you mean?  
18 A. He was thinking about joining his uncle in the  
19 merchant marines.  
20 Q. I bet you're glad he decided not to do that?  
21 A. Yeah, right.  
22 MR. SMITH: 7319.  
23 Q. Could you tell us what 7319 is, please?  
24 A. Yeah. My three daughters and my mother gave us a  
25 surprise 25th wedding anniversary at her house.

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J. Tompkin - Direct  
1 And this is us at the party getting ready to  
2 cut the cake.  
3 MR. SMITH: 7317.  
4 Q. And this one, could you tell us what 7317 is?  
5 A. It's brick walls and pillars that he -- that was one  
6 of the last things he built over at West Point Market on  
7 West Market Street.  
8 I don't know how many people in here know  
9 West Point Market, but this comes off of the side street.  
10 It was their side street entrance and they wanted to dress  
11 it up.  
12 Q. Was this the type of work that he was doing around  
13 that time?  
14 A. Yes. He was -- he wasn't doing anything really, you  
15 know, big, big because he didn't have the stamina for it.  
16 MR. SMITH: 7323.  
17 Q. Could you tell us what 7323 is, please?  
18 A. It's the day of my middle daughter Denise wedding.  
19 That was October 27th, oh, she -- or October  
20 1st, I'm sorry. She just, well, in fact, is today the 1st?  
21 Q. Yes.  
22 A. Today is their 13th wedding anniversary. She was  
23 married 13 years ago on October 1st.  
24 Q. And where is she living now?  
25 A. She is living in Indianapolis, Indiana.

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J. Tompkin - Direct  
1 Q. And this is 7274.  
2 Could you tell us what Exhibit 7274 is,  
3 please?  
4 A. This is Donna Jean's wedding day. This was on  
5 September 18th. They just had their eighth anniversary  
6 here in September, whatever that adds up to. But it's been  
7 eight years.  
8 That's in our backyard where that was taken.  
9 Q. That was the backyard on Hayes Avenue?  
10 A. On Hayes Avenue, yes.  
11 Q. And we have Exhibit 7273.

12                   Could you tell us what that is?  
13       A.       Oh, that's a -- oh, that was taken on the cruise  
14       ship, too, but as you can see, he doesn't have much hair  
15       there so that was probably taken in 1990 -- I have to stop  
16       and think -- '93, I think. No, '94 it was, '93 or '94.  
17       And it's somewhere in that area.  
18                I can't remember the exact date, but it was  
19       after he had taken his chemo and radiation.  
20       Q.       And that was the reason for the --  
21       A.       Hair loss, yes.  
22       Q.       And this is Exhibit 7322?  
23       A.       That was taken on his 60th birthday at our house.  
24                No, wait a minute. It might have been  
25       father's day, one or the other. It was father's day, I'm  
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                  J. Tompkin - Direct  
1       sorry, it was father's day. Would have been in 1960.  
2       Would have been in 1960. I mean 1990.  
3       Q.       1990?  
4       A.       Father day, 1990. That's not right either. I'm  
5       sorry.  
6                My dates, I can't think.  
7                '95. I'm sorry.  
8       MR. NACE: Excuse me, I didn't mean to block  
9       your view here.  
10      Q.       We have Exhibit 7318.  
11               And could you tell us what this depicts?  
12      A.       That's the brick wall that's behind the family room,  
13      was -- that he built when we had the house.  
14               And that extends into the backyard farther,  
15      too.  
16      Q.       That's your backyard at Hayes?  
17      A.       Yes.  
18      Q.       Hayes Avenue?  
19      A.       Yes. Um-hmm.  
20      Q.       Here's Exhibit 7324.  
21               Could you tell us what this depicts?  
22      A.       This is -- we went to Florida in -- for the month of  
23      February, in 1994.  
24      Q.       Where did you go in Florida?  
25      A.       Oh, this is Madeira Beach, we were staying at Madeira  
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                  J. Tompkin - Direct  
1       Beach in Florida. That's a little bit north of St.  
2       Petersburg in Florida.  
3       Q.       And how was Mr. Tompkin doing at the time?  
4       A.       Not too good. That's why the doctor told him it  
5       would be good for him to go to Florida for the winter,  
6       because that would help him get his strength back and that.  
7       And it did, because he liked Florida a lot so he could go  
8       fishing everyday.  
9       Q.       So he went fishing while you were down there?  
10      A.       Yeah, on the inland waterway. Our condo was right on  
11      the inland waterway. So he could go fishing, just walk out  
12      on the dock and go fishing everyday.  
13      Q.       Okay. Thank you. That's all I have. If I could get  
14      the lights.  
15               We talked a little bit, Mrs. Tompkin, about  
16      the -- Mr. Tompkin's illness and a little bit about how it  
17      affected him, and I wonder if you could tell us how, at  
18      first, when he first found out about it, how it affected  
19      him at that time.  
20      A.       That's hard to say.

21                               You mean personally or physically? I mean,  
22     you know.

23     Q.     Maybe you can tell us some of the things he had to  
24     change about his life.

25     A.     I know when he started taking radiation, he was

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J. Tompkin - Direct

1     working at the same time so he always planned it that he  
2     would get off work at 3:00 o'clock so he could get the  
3     radiation, and come home and come home and lay down, then  
4     have supper, and a couple hours go back to bed so he could  
5     go back to work the next day.

6                       He worked the whole time he was getting  
7     radiation. I don't know how he did it, but he did.

8                       Weekends he was very tired. He would sleep  
9     like 12, 15 hours a day. Radiation didn't make him sick,  
10    it just made him very, very tired so.

11    Q.     Now, you also mentioned the chemotherapy?

12    A.     Yeah, chemo now was a different story. Chemo made  
13    him very ill. The first treatment he got wasn't too bad,  
14    he was only in the hospital twelve hours, but everytime he  
15    got chemo -- he got it, like, every six weeks -- each one  
16    got worse.

17                      Like, the second one, he was in the hospital  
18    24 hours. The next one, he was in the hospital two days;  
19    the next one for three days.

20                      He was getting two of the most powerful ones  
21    that were on the market at that time in massive doses. So  
22    they didn't agree with him, let's put it that way, at all.

23    Q.     How long did that last?

24    A.     Well, he started even before he had -- he had chemo  
25    and all the radiation before the operation at the end of

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J. Tompkin - Direct

1     September. And then he had three more chemo treatments  
2     after the operation.

3                      So overall it was probably over like a six,  
4     eight-month period.

5     Q.     And did he continue to work during that time period?

6     A.     He went to work -- after the operation, he didn't go  
7     back to work until, I think it was, like late December or  
8     the first part of January. And then it was only on a,  
9     like, three or four hours a day, when the weather would  
10    permit.

11                      He finally in February, I think it was  
12    February, he just couldn't go any longer. He says, you  
13    know, he tried working maybe one or two days a week, but  
14    that was about it. Come summer time, towards fall, he  
15    couldn't work any more at all so.

16                      THE COURT: Fall of what year?

17                      THE WITNESS: That would be '94 -- no, wait a  
18    minute, '95, I'm sorry. '95.

19                      THE COURT: That was after the video  
20    deposition. As I recall, the video deposition that we saw  
21    here in the courtroom was taken in 1994?

22                      THE WITNESS: Yes. Yes.

23                      THE COURT: He died in 1996?

24                      THE WITNESS: Right. Right. Yes.

25

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J. Tompkin - Direct

1     BY MR. NACE:

2     Q.     Did the cancer -- could you tell us whether the

3 cancer affected his breathing at the time period you are  
4 talking about, at -- in the fall of '94?  
5 A. Yes, he started on oxygen, not too long after that  
6 deposition. First it was only for six, eight hours a day.  
7 Then it just kept getting worse, so he was on it 24 hours a  
8 day. No matter where we went, we had to take oxygen with  
9 us.  
10 And he was on the full amount. When you use  
11 those tanks, they only lasted an hour and a half because he  
12 had to have it on so strong.  
13 Q. What arrangements did you have to make to travel,  
14 if --  
15 A. I had to carry spare oxygen tanks with me and they  
16 come on a little portable cart. And the longest we could  
17 stay out would be, like, about four to five hours because I  
18 would only carry three tanks because they are too dangerous  
19 to carry in vehicles, if you get that many together.  
20 Q. Where would you put them in the vehicle?  
21 A. I'd have to put them way in the back and bungee cord  
22 them so they wouldn't move around if I stop fast or  
23 something, because I was told by my brother-in-law -- who  
24 was an ex-fireman -- that if they would hit something real  
25 solid or hard and did something to the controls, it could

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J. Tompkin - Direct

1 cause an explosion.  
2 I says terrific, so I rigged up a way to keep  
3 them safe.  
4 Q. What was Mr. Tompkin's mental state at that point,  
5 let's say in the fall of '94, from there until he passed  
6 away?  
7 A. He was on a lot of pain killers so he really -- his  
8 attention span was getting shorter and shorter. He was  
9 very agitated. He'd kind of pace around. He'd go from  
10 chair to chair to chair. He couldn't seem to be satisfied.  
11 And the August before he died, he was in the  
12 hospital for over a week, his electrolytes and stuff were  
13 all messed up, and didn't know me, didn't know the kids.  
14 Took a week for him to get out of that and come back home.  
15 And from then on he went, you know, downhill.  
16 Q. And we discussed earlier the fact that he passed  
17 away.  
18 How old was he when he passed away?  
19 A. He was 61. He just turned 61 in December, and he  
20 passed away in February.  
21 Q. And could you tell us whether you were appointed to  
22 handle his -- the affairs of his estate?  
23 A. Yes, I was.  
24 Q. And you have been doing that, you have taken care of  
25 that?

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J. Tompkin - Direct

1 A. Yes.  
2 Q. Could you tell us what are some of the things you  
3 miss doing with Mr. Tompkin?  
4 A. Just everyday, having him around, and cruises. You  
5 see, that's two things, but just having him around so I'm  
6 not alone.  
7 MR. NACE: No further questions.  
8 THE COURT: May I see counsel at the bench  
9 for a moment, please?  
10 (Proceedings at side-bar:)  
11 THE COURT: Well, I want to point out to

12 plaintiff's counsel that you have a loss of consortium  
13 claim during his lifetime, and I don't think I've heard any  
14 testimony in the record so far that would support that  
15 claim.

16 I know that's possibly a little awkward, but  
17 you really haven't shown how his illness in any way  
18 affected her right of consortium during his lifetime.

19 Now, you might want to, you, Bryan, you and  
20 Mr. Smith might want to talk it over before you conclude  
21 that you've completed your direct, because if there is no  
22 more testimony, I'm sure I'll get a motion to take away the  
23 loss of consortium damage claim from the jury.

24 So I'll give you a couple minutes to talk it  
25 through.

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J. Tompkin - Direct

1 MR. COFER: We would not object if Russ  
2 decided he wanted to ask questions.

3 THE COURT: Russ.

4 MR. SMITH: Yes, sir.

5 THE COURT: Mr. Cofer said he would not  
6 object if you wanted to ask some questions at this time.

7 But you two talk it over.

8 MR. SMITH: I appreciate that.

9 (End of side-bar conference).

10 MR. NACE: Your Honor, if I might have a few  
11 more questions.

12 THE COURT: Please.

13 BY MR. NACE:

14 Q. Mrs. Tompkin, could you tell us how Mr. Tompkin's  
15 illness affected your marital relations with Mr. Tompkin?

16 A. Well, he, when he had the chemo, there was no more  
17 sexual relations at all because of the chemo and the  
18 radiation. That was it.

19 So that was like five years before he died.

20 Q. And did -- could you tell us whether the illness  
21 diminished your ability to do things together, activities  
22 that you normally would have carried out?

23 A. Oh, yes. We never went out to eat, hardly out to eat  
24 anymore; no movies, nothing. We just stayed in.

25 Once in awhile I would get him out for

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J. Tompkin - Direct

1 breakfast, but it was -- he figured it was too hard. I was  
2 willing to take him, but he didn't want to go.

3 Q. And did this affect the types of things that  
4 Mr. Tompkin was able to do around the house, things he was  
5 able to accomplish there?

6 A. He worked on his woodworking up until, like, two  
7 years before he died.

8 He would string out, he had like a hundred  
9 foot of line hooked up to his O2 machine so he could still  
10 go down in the basement. He bought air scrubbers, he  
11 bought powerful things to clean up the air. He would wear  
12 a mask and everything so he could work down there.

13 But the last two years, he couldn't do that  
14 even because he couldn't get up and down the steps so.

15 MR. NACE: Thank you.

16 No further questions.

17 THE COURT: Thank you. You may  
18 cross-examine.

19 MS. CHAPMAN: No questions, Your Honor.

20 THE COURT: You may step down. Thank you.

21 THE WITNESS: Thank you.  
22 (Witness excused).  
23 THE COURT: May I see counsel at the bench  
24 for a moment, please?  
25 MR. SMITH: Yes, sir.

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1 (Proceedings at side-bar:)  
2 THE COURT: Just some housekeeping matters.  
3 You've indicated to me that there is going to  
4 be the stipulation about no warning, and I don't know when  
5 you want to present that.  
6 Russ, I said I've got some housekeeping  
7 things.  
8 MR. SMITH: Yes, sir.  
9 THE COURT: There is the issue of when you  
10 are going to tell the jury of the fact of the stipulation.  
11 There is also the question of whether and  
12 when Feingold is going to be available tomorrow. And as I  
13 understand, that's your -- is that your last witness at  
14 this point? Because what I'm thinking about doing is  
15 giving the jury a recess now so you can kind of see where  
16 you are on that, because I'm not sure what to tell them at  
17 this point.  
18 I don't want to bring them at 9:00 o'clock  
19 and find out that we are going to be delayed.  
20 MR. SMITH: Yes, sir.  
21 THE COURT: And also you've got to decide  
22 when you want to put the stipulation in and get that in  
23 before the jury.  
24 And then, additionally, if we are going to  
25 release this jury, then I want to spend the rest of the

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1 afternoon handling your exhibits. So we have some dead  
2 time, we might as well use it.  
3 But I'm going to give them a recess now, but  
4 the first thing I want to do is have you all figure out  
5 where you are on Feingold.  
6 So I'll give you about 15 minutes.  
7 MR. SMITH: I'll call my office.  
8 THE COURT: Yeah.  
9 And then I don't care when you put the  
10 stipulation in, today or tomorrow. I just don't want you  
11 to forget it.  
12 And then finally you've got -- we've got the  
13 exhibits that I would like to handle this afternoon.  
14 (Discussion had off the record).  
15 MR. COFER: No warnings on cigarette packs or  
16 on advertisements before January 1st, 1966, is that right?  
17 MR. SMITH: Okay.  
18 MR. COFER: Does that work for you?  
19 MR. SMITH: Sure. That's --  
20 MR. COFER: Can you read my writing?  
21 MR. SMITH: Sure.  
22 THE COURT: Might as well do that right now  
23 and give them the recess.  
24 MR. COFER: See if you can read that.  
25 MR. SMITH: I can read it. I can read it

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1 sometimes.  
2 MR. COFER: Is that okay with everybody?  
3 Propose to stipulate that no warnings on cigarette packs or  
4 advertisements before January 1st, 1966?  
5 Does that work?



6 MR. SUFFERN: Yes.  
7 THE COURT: I'll tell you what: Can you just  
8 read that to them? There is no objection by any --  
9 MR. SMITH: We can deal with the rest of them  
10 tomorrow.  
11 MR. COFER: Sure.  
12 THE COURT: We will do that and take the  
13 recess.  
14 (End of side-bar conference).  
15 THE COURT: Members of the jury, the parties  
16 always have the opportunity, if they so elect, to enter  
17 into a stipulation of fact, and when they do that, then the  
18 jury is bound by just the same as if the testimony was  
19 presented.  
20 There is a stipulation of fact that I'm going  
21 to ask the court reporter now to read to you, and then you  
22 should assume that that has now been established as a  
23 matter of fact and needs no additional proof.  
24 Would you read it, please?  
25 THE REPORTER: "There were no warnings on  
1284  
1 cigarette packs or advertisements before January 1st,  
2 1966."  
3 THE COURT: That means all four defendants  
4 agree as indicated in that stipulation.  
5 We are now going to take a recess, it will be  
6 about 15 minutes, so file out and I'll call for you as soon  
7 as I'm ready.  
8 You may file out.  
9 (Jury out).  
10 THE COURT: Do you have a phone you can use?  
11 If you want to use our office for phones, you can use them.  
12 MR. COFER: I called our people.  
13 THE COURT: See what you can find out, and  
14 I'll be back out here about 20 after 3:00.  
15 MR. SMITH: Yes, sir.  
16 THE COURT: Okay?  
17 (Recess taken)  
18  
19  
20  
21  
22  
23  
24  
25  
1285  
1 THE COURT: Let the record show the jury's not  
2 returned.  
3 What have we worked out for tomorrow?  
4 MR. COFER: Russ isn't back yet. I understand  
5 he's speaking with his secretary trying to find out  
6 the details. I've personally not talked with anyone  
7 in Miami. It is my understanding I'll have a lawyer  
8 to be available. He just needs to know when and  
9 where.  
10 One thing I would like to work out with Russ  
11 is what exhibits he's going to use, so I can have a  
12 copy here and copy there and all that stuff.  
13 THE COURT: Right.  
14 MR. COFER: I've never done this live.  
15 THE COURT: That will make two of us.  
16 MR. SMITH: Thank you very much for your

17 patience.  
18 THE COURT: Let the record show the jury's not  
19 here in the courtroom.  
20 What have you been able to determine  
21 regarding Feingold's availability and the process?  
22 MR. SMITH: Your Honor, with the court's  
23 permission, we would call tomorrow, if we can, the  
24 decedent's brother Gary for a couple questions. Other  
25 than that, it would be reading depositions and putting  
1286  
1 the proffering any Exhibits we are permitted to do.  
2 And if we are permitted to recall Dr. Burke, we would  
3 do so. I think we have to read some interrogatories  
4 into the record and a few other stipulations and that  
5 type of detail.  
6 MR. COFER: What about Feingold?  
7 MR. SMITH: I think we are going to go just as  
8 I said.  
9 MR. COFER: No Feingold?  
10 MR. SMITH: Yes.  
11 MR. COFER: I have to step out and cancel what  
12 I have going. So no Feingold?  
13 MR. SMITH: Yes.  
14 MR. COFER: Are you going to bring the jury in?  
15 THE COURT: I want to see what we are doing  
16 more until I bring the jury in.  
17 MR. COFER: Okay. I'll do this later.  
18 THE COURT: You are going to call Tompkin's  
19 brother and beyond that?  
20 MR. SMITH: Beyond that we would like to  
21 proffer. We would like to read some deposition, if we  
22 have the court's permission. We would like to proffer  
23 documents; if we have the court's permission, there  
24 are some interrogatories to be read, exhibits have to  
25 be offered and stipulations.  
1287  
1 THE COURT: Well, I want to start working on  
2 exhibits right now. But depositions, I still don't  
3 know what you are talking about depositions. I don't  
4 want to wait until tomorrow to make rulings on  
5 depositions.  
6 MR. SMITH: Yes, sir.  
7 THE COURT: Are you ready to bring that to my  
8 attention also?  
9 MR. SMITH: We are, your Honor.  
10 THE COURT: Let me inquire of the defendants.  
11 It sounds like very limited testimony tomorrow from  
12 the plaintiff, what I'm hearing.  
13 What is your schedule like?  
14 MR. COFER: My understanding is we can have  
15 witnesses tomorrow afternoon.  
16 MR. McLAUGHLIN: They are coming in tonight,  
17 your Honor, we hope or tomorrow morning.  
18 THE COURT: If they are coming in tonight, why  
19 can't you go with them tomorrow morning?  
20 MR. MILLIMAN: We can, your Honor.  
21 MR. McLAUGHLIN: Hopefully we can. We are  
22 doing our best to get them here as quickly as  
23 possible. We can only get a limited number in, that's  
24 the problem.  
25 MR. COFER: The thing is, we can get witnesses  
1288  
1 in putting them on in the morning, put some on in the

2 afternoon. I don't think we can do a whole day  
3 tomorrow, is what I'm telling you.  
4 THE COURT: I appreciate that. I'm just  
5 deciding whether I should bring the jury in that early  
6 or not.  
7 If we are going to read deposition testimony,  
8 there is a reason for having them in early; if we are  
9 not there isn't, it seems to me.  
10 And the worst thing to do is to bring them in  
11 tomorrow at 9:00 o'clock and hear 15 minutes of  
12 testimony and bring them back at one. They will think  
13 I've lost my marbles. They may already think that.  
14 But the deposition testimony is something  
15 that would take up some of the morning if there are  
16 any depositions that are relevant. But we had this  
17 discussion the other day and I was having difficulty  
18 understanding the relevance of any depositions. Are  
19 you talking about depositions in this case or  
20 testimony in other cases?  
21 MR. SMITH: Other cases, your Honor.  
22 THE COURT: Well, let's go through it. I'm  
23 going to hold up on the jury before I decide what I'm  
24 going to do on that.  
25 Go ahead.

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1 MR. SMITH: May it please the court. Your  
2 Honor, one of the depositions we would request to read  
3 is the deposition --  
4 THE COURT: Let me make sure, when you use the  
5 phrase deposition, do you mean trial testimony or a  
6 deposition taken in another case for a trial in  
7 another case?  
8 MR. SMITH: Your Honor, it was a deposition in  
9 a case.  
10 THE COURT: Unrelated to this case.  
11 MR. SMITH: Yes, sir.  
12 THE COURT: All right. And who was the  
13 deponent?  
14 MR. SMITH: The deponent was Irwin Tucker.  
15 THE COURT: And who were the parties.  
16 MR. SMITH: The caption is Middletown versus  
17 Armstrong World Industries.  
18 Your Honor, when the deposition was taken,  
19 those present were attorneys for Philip Morris,  
20 attorney for doctor Tucker, for Reynolds, Lorillard,  
21 counsel for Tobacco Research. Liggett was a party to  
22 one or more of the noticed cases. But I read from  
23 that, your Honor, they did not attend the depo but  
24 they were noticed, is my belief.  
25 THE COURT: When was it done?

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1 MR. SMITH: It was done on July 28th, 1997.  
2 THE COURT: How long is the deposition?  
3 MR. SMITH: I would point out we would not be  
4 requesting to read it all. We designated pages that  
5 were previously filed.  
6 I can indicate to the court some of the  
7 topics we would like to cover, if the court would  
8 desire.  
9 THE COURT: Well, who is Irwin Tucker?  
10 MR. SMITH: Irwin Tucker, he was, he worked at  
11 Liggett & Meyers from '48 to '52 mnd then he went to  
12 Brown and Williamson in '53. He was present at the

13 December, '53 meeting at The Plaza Hotel in New York,  
14 where the companies agreed to undertake a joint effort  
15 to address the publicity problem.

16 In his deposition, he indicates that Hill and  
17 Knowlton were present at some point during that  
18 meeting -- withdraw that. What's not accurate. Were  
19 present at some point after the company Presidents  
20 decided to entertain proposals from public relations  
21 organizations and Hill & Knowlton's names were  
22 suggested at The Plaza Hotel meeting.

23 He then indicates that Hill & Knowlton then  
24 became present after the company presidents decided to  
25 entertain the proposals.

1291

1 And in the early 1950's, he was familiar with  
2 Dr. Ochsner's publications. He would be able to  
3 testify that the Tobacco Industry Research Committee  
4 was formed during the meeting at The Plaza Hotel; and  
5 that Hill & Knowlton provided the office space for the  
6 Tobacco Industry Research Committee.

7 That the Tobacco Industry Research Committee  
8 utilized Hill & Knowlton's employees, and Dr. Tucker  
9 provided the names of people who worked for various  
10 tobacco companies.

11 He's able to name many of the people who were  
12 present at The Plaza Hotel '53 meeting.

13 He testifies that the Presidents were aware  
14 of Dr. Wynder's research concerning cigarettes and  
15 lung cancer at that December meeting. And that he  
16 personally had read them.

17 He testified regarding the purpose of the '53  
18 meeting in New York, and that it lasted for two days.

19 That the presidents discussed various actions  
20 the industry could take in response to the medical  
21 research which had been published.

22 That the researchers involved in the studies  
23 were not invited to the meeting. To his knowledge,  
24 that no medical doctors statisticians or  
25 epidemiologists were present at the meeting.

1292

1 That he was unaware of any published research  
2 at that time that found that cigarette smoking did not  
3 cause lung cancer; and that to his knowledge, no one  
4 at the meeting took that position, took the position  
5 that there was such research.

6 Dr. Tucker testified that the Presidents at  
7 that meeting did not discuss whether or not they  
8 should issue warnings to their customers regarding  
9 health hazards reported in the literature.

10 That the presidents at that meeting then  
11 created what became known as the Tobacco Industry  
12 Research Committee.

13 That its purpose was to develop information  
14 and the means of getting the information to the  
15 public.

16 That they hired Hill & Knowlton to take  
17 cognizance of the publicity and to formulate a  
18 response, which was also the purpose of the Tobacco  
19 Industry Research Committee.

20 That the purpose of the TIRC was to respond  
21 to adverse publicity that had been generated by virtue  
22 of research; and that the TIRC was involved in funding  
23 research and he did not know that what they would do

24 if funded research concluded that there was an  
25 association between smoking and lung cancer.

1293

1 That the members of the industry technical  
2 committee, to his knowledge, were not paid by it; and  
3 that when he worked for it he did so as an employee of  
4 Brown and Williamson.

5 That the TIRC authorized the white paper  
6 which he assumed Hill and Knowlton wrote, and that he,  
7 as a member of the ITC prepared a letter to Mr. Goss,  
8 Executive Vice President of Hill & Knowlton, regarding  
9 the white paper wherein he suggested it be entitled  
10 Smoking and Health, the Facts Are Not Alarming.

11 Following the deposition, his deposition that  
12 was taken on July 28th and 29th, the tobacco companies  
13 obtained medical reports which have been submitted by  
14 the non-Liggett defendants in this case. The reports  
15 challenge his physical and mental condition when he  
16 gave the depo, but they do not state that he was  
17 incompetent to testify at either of those two  
18 depositions.

19 In point of fact, and after obtaining those  
20 medical reports, the attorneys representing Brown &  
21 Williamson, it appears that they were representing  
22 themselves and American Tobacco as the successor in  
23 interest when noticed Dr. Tucker for his video  
24 deposition on October 24th, 1997. And he was deposed  
25 in the presence of a magistrate on that date in a

1294

1 number of cases, and indicated are attorneys for Dr.  
2 Tucker, for Philip Morris, Reynolds, Lorillard,  
3 Tobacco Research were also present. Liggett was also  
4 a party to one or more of the noticed cases,

5 And that is, Your Honor, in a nutshell, I  
6 guess, is Dr. Tucker's depo from plaintiff's point of  
7 view.

8 THE COURT: And what does that testimony  
9 establish in terms of your case in chief?

10 MR. SMITH: Your Honor, I believe it  
11 establishes that when they met, they came up with a  
12 plan to publish, to respond to adverse publicity, they  
13 created this committee, which there will be other  
14 testimony with, if permitted, will be able to show  
15 what that publicity said; what the publicity that  
16 committee did publish. Be able to establish that,  
17 your Honor, during this meeting in New York, they,  
18 they discussed nothing about warning anybody, having  
19 doctors do it or anything of that nature.

20 They were trying to respond to things -- we  
21 think it's a clear implication the purpose was to  
22 respond to this adverse publicity, which they were  
23 afraid that would kill the goose that laid the golden  
24 egg, if you don't mind me speaking in those terms,  
25 your Honor. And that's what they set about doing, and

1295

1 they have done it. They did it until recently the  
2 group was ordered disbanded.

3 Although I should say this to the court, this  
4 created a separate entity about 3 years later. That's  
5 when the Tobacco Institute was created, and it was  
6 more public relations. And the Tobacco Industry  
7 Research Committee took on the -- at least they had  
8 took on the appearance of research committee. And

9 that's we can test that as to what they really did.  
10 But they never, there was no, the concept of  
11 stepping forward and warning the public or even  
12 advising them or informing them, doesn't appear to  
13 have ever occurred at that meeting and --  
14 THE COURT: You've already got a stipulation  
15 they didn't warn.  
16 MR. SMITH: We do, your Honor. But we also  
17 have, here it's for instance, your Honor, Dr. Tucker,  
18 he testified that this meeting, that when he went to  
19 this meeting, we talk about having knowledge that when  
20 he was there he had never read anything contesting the  
21 mouse study reports of the link between smoking and  
22 lung cancer.  
23 And that it goes on further to say that he  
24 had the same, let's see, that all the presidents that  
25 were there were aware of the research. Nobody stepped  
1296  
1 forward and he --  
2 THE COURT: I still don't understand what  
3 element of your case it proves.  
4 MR. SMITH: I think it proves if it were a  
5 criminal case, I think it would be relevant to the  
6 issue of scienter. And I think if it is a civil case  
7 it goes relative to the issue of having actual  
8 knowledge of the risks of lung cancer being derived  
9 from smoking.  
10 Something that they -- they have taken the --  
11 something that they have always denied, except maybe  
12 tragically recently.  
13 But if they, your Honor, if when it says a  
14 conscious disregard in the syllabus of Preston V  
15 Murdy, we would respectfully urge the court to  
16 consider this as going to what, what they were aware  
17 of and disregard it. In fact, didn't even give it the  
18 decency to consider issuing a warning there from the  
19 get go, their goal.  
20 THE COURT: Tucker was employed by whom?  
21 MR. SMITH: He was employed -- by that time he  
22 had been by Liggett & Meyers. And at that time when  
23 he was at that meeting he was employed by Brown &  
24 Williamson at that time.  
25 THE COURT: So he was not a spokesman for some  
1297  
1 of the defendants in this case?  
2 MR. SMITH: At that point in time, your Honor,  
3 he was there, he was there representing Brown &  
4 Williamson, as I understand it. But he did report  
5 what happened. And, in fact, I don't know that I  
6 have -- I obviously don't -- I'm not the end all of  
7 knowledge on this at all, but I haven't seen anything  
8 so far from any defendant that denies what occurred at  
9 that meeting. But there may be documents out there  
10 that I'm not aware of.  
11 THE COURT: Well, the fact they haven't denied  
12 it doesn't mean it makes it relevant, counselor.  
13 What's the position of the defendants?  
14 MR. SUFFERN: Your Honor, I'm inviting my  
15 colleagues to help me, because I have to admit, and I  
16 apologize in advance if I'm somewhat disjointed, we  
17 have 30 or 40 depositions, and I'm going to do my best  
18 on the fly to respond to the ones that -- as Mr. Smith  
19 raises them.

20           The first point I want to make about Irwin  
21 Tucker, your Honor, at the time of the meeting to  
22 which Mr. Smith referred he was not employed by any  
23 defendant in this case.  
24           He was an employee of Brown & Williamson  
25 Tobacco Corporation and, as your Honor is aware, in  
1298

1       1953 Brown & Williamson and American Tobacco Company  
2 were robust competitors. They had no corporate  
3 relationship whatsoever. So on that point we don't  
4 see how -- what a non-party employee who has, who is  
5 reporting about something that happened at a meeting,  
6 how that can be probative of any knowledge of any of  
7 the defendants in the case.

8           But there are other problems with  
9 Mr. Tucker's deposition, your Honor. And Mr. Smith  
10 can I just ask for a clarification, it is the  
11 July 29th deposition of Irwin Tucker that you seek to  
12 read from?

13       THE COURT: He says July 28th.

14       MR. SMITH: Both of them.

15       MR. SUFFERN: Twenty-eighth and 29th.

16       Your Honor it is interesting that Mr. Smith  
17 mentioned there was a subsequent deposition. The  
18 reason there was a subsequent deposition, and the  
19 reason we laid this out in our papers, on the issue we  
20 filed some time ago at the deposition, the second day  
21 of the deposition that Mr. Smith wants to introduce  
22 and read to the jury in this case, Mr. Tucker, who was  
23 feeble and elderly at the time, became confused and  
24 disoriented. We have put into the record in this case  
25 already, it was for that reason that the deposition  
1299

1 ended prematurely. We have already put in the record  
2 affidavits from two of Dr. Tucker's treating  
3 physicians. And, your Honor, if I may just quote from  
4 portions of those affidavits regarding Mr. Tucker's  
5 competency to testify at this point in his life.

6       The treating physicians, excuse me I know I  
7 have it here.

8       THE COURT: Well, I don't want to have a rehash  
9 about what you have already said about this. I'm  
10 struck trying to figure out relevancy here. There is  
11 an admission, there was no warning. This took place  
12 in -- this so called meeting took place in 1953. The  
13 court has eliminated conspiracy as a, as a cause of  
14 action in this case, eliminated fraud. This is just a  
15 flat out products liability case in which the claim is  
16 that the product was dangerous, there was no warning,  
17 and the defense is common knowledge.

18       Now, why we are off on all these other issues  
19 is frankly, it's beyond me, and I haven't even  
20 addressed the question of whether or not there is a  
21 403 objection here; that whatever relevance it is the  
22 prejudice outweighs it.

23       Furthermore, there is no indication  
24 apparently that Tucker was there testifying for any of  
25 the individual defendants. He's testifying about it,  
1300

1 so what he says doesn't come in as an admission. And  
2 it's just testimony about what transpired at a meeting  
3 where there was an attempt to, on the tobacco  
4 companies, to deflect the adverse publicity that they

5 were getting about the dangers of smoking.  
6 I have not yet heard what the defense is in  
7 this case. I gather the defense is no proximate cause  
8 and common knowledge. I haven't heard the defense. I  
9 heard haven't heard the defense the product was  
10 marvelous and wonderful and everybody should be  
11 smoking it because it is good for their health.  
12 So I'm having difficulty at this point as to  
13 why I should let this in. Something might happen in  
14 the defense of this case that might arguably make it  
15 admissible, but at this point I don't see it,  
16 Mr. Smith.  
17 MR. SMITH: May I respond briefly, your Honor.  
18 THE COURT: I have a jury. It is now five  
19 minutes to 4:00. I'm trying to decide when to bring  
20 them in tomorrow, and my frustration level is getting  
21 kind of high here.  
22 How many more of these, quote, depositions  
23 that were not taken in in case do you want to offer?  
24 MR. SMITH: There is a probably a total -- we  
25 would like to submit, your Honor, probably 5 or 6,  
1301  
1 approximately.  
2 THE COURT: Bring the jury back.  
3 (The jurors were returned to the courtroom and  
4 the following proceedings were conducted in open court,  
5 As follows:)  
6 THE COURT: Members of the jury, please be  
7 seated. And I recognize that we've taken precious  
8 little testimony this afternoon, and I'm certain that  
9 your frustration level is at a high index. I  
10 apologize for the delays.  
11 There are still matters that I need to  
12 determine before we continue with the testimony.  
13 Rather than have you all sit around here tomorrow  
14 morning wondering what's going on, I'm going to delay  
15 your appearance until 1:00 o'clock tomorrow afternoon.  
16 Please be ready to go forward at 1:00 o'clock tomorrow  
17 afternoon.  
18 Please do not discuss this case among  
19 yourselves. Do not let anyone discuss it with you.  
20 See you tomorrow at 1:00 o'clock.  
21 You may file out.  
22 (The jury withdrew from the courtroom and  
23 the following proceedings were held in open  
24 court.)  
25 THE COURT: Please be seated.  
1302  
1 THE COURT: Do you have the page numbers of the  
2 deposition which you read into the record tomorrow  
3 that I can take home and read rather than going  
4 through this exercise?  
5 MR. SMITH: Yes, sir.  
6 THE COURT: Well, how soon can you get that to  
7 me?  
8 MR. SMITH: If we could have a few minutes, we  
9 are in the process of reducing it and, whatever the  
10 court tell us you have to have it there we can. But  
11 we did propose some -- we are trying to whittle it  
12 down.  
13 THE COURT: I also want to spend the rest of  
14 the day getting the exhibits in. We have literally  
15 blown a half a day here with almost accomplishing



16 nothing.  
17 Do you have a list of the Exhibits you are  
18 going to offer?  
19 MR. SMITH: Your Honor, the the Exhibits 1  
20 through 20 --  
21 THE COURT: You have a list, first of of all,  
22 that the courtroom deputy can rely on because she's  
23 responsible for the exhibits, she has to be able to  
24 keep score in some way. Do you have an identification  
25 of your exhibits that you can give to her that she can  
1303  
1 check off when the exhibits are offered and either  
2 admitted or denied.  
3 THE CLERK: I can photocopy anything you have.  
4 THE COURT: Well, Mr. Smith, your list of  
5 exhibits is -- mine says 4/3 revised exhibit list. I  
6 thought I heard you say something about third revised.  
7 MR. NACE: Yes, your Honor. The numbers would  
8 be the same for the first 53 pages until in the last  
9 week in the courtroom we have added some exhibits, and  
10 I think those are the only changes, the ones we have  
11 here, it was revised in the weekend over the weekend  
12 in our office.  
13 THE COURT: Now, it's abundantly clear to the  
14 court that many of of these exhibits have not been  
15 previously identified, nor has there been any  
16 testimony about them. So I'm now curious as to which  
17 exhibits that you intend to offer, I'm not going to go  
18 through 54 pages with probably 30 to 40 exhibits  
19 listed on each page. That gets me up over a thousand  
20 exhibits, maybe 2,000 exhibits.  
21 Do you have, have you been keeping track of  
22 the ones that you identified and wish to offer?  
23 MR. SMITH: Your Honor, I believe that's true,  
24 although there are some -- for instance, for example,  
25 Exhibits 1 through 24, the hospital medical records  
1304  
1 of -- both sides have stipulated as to those without  
2 the necessity of bringing in anyone, I believe, is  
3 that correct?  
4 MR. COFER: That is correct.  
5 THE COURT: So Exhibits 1 through 24 are  
6 offered and admitted.  
7 MR. SMITH: And then 25 is the, is the  
8 Northlawn Cemetery funeral bill.  
9 26 is a --  
10 THE COURT: Nobody's identified it.  
11 MR. SMITH: We haven't brought anyone in from  
12 Northlawn, your Honor. But with the court's  
13 permission it is a funeral bill.  
14 MR. COFER: We will stipulate to that.  
15 THE COURT: 25 is in.  
16 MR. SMITH: 26 is certified social security  
17 information. Gives his earnings. We would like to  
18 proffer that.  
19 THE COURT: Any objection?  
20 MS. CHAPMAN: In view of Dr. Burke's testimony,  
21 he folded it all up together, so I'm not sure how many  
22 different documents you want to put in front of the  
23 jury. There is no need for it. That's exactly what  
24 Dr. Burke took when he came up with this hundred  
25 thousand dollars of loss earnings.

1305

1 MR. COFER: Or if you will prepare a chart that  
2 has the numbers. So if you want to have one charting  
3 to the jury in terms of his specials, so it will be  
4 clear what the specialties were. So, for example, if  
5 you want to just prepare a chart in it that says  
6 funeral expenses X, medical expenses X, loss earnings  
7 X.  
8 MR. SMITH: We'll try to come up with something  
9 that will satisfy.  
10 THE COURT: All right.  
11 MR. SMITH: The only problem is the lost  
12 earnings. What he would have done after 65 will also  
13 be in.  
14 MR. COFER: Dr. Burke testified to that.  
15 MR. SMITH: There is the death certificate and  
16 birth certificate, 27 and 28.  
17 THE COURT: Any objection?  
18 MR. COFER: Do you have the death certificate?  
19 May I see it, please?  
20 MR. COFER: No objection to the birth  
21 certificate.  
22 THE COURT: What did we decide about the death  
23 certificate?  
24 MR. COFER: He's looking for it. I want to see  
25 it. Sometimes --

1306

1 THE COURT: Sometimes they have a cause of  
2 death?  
3 MR. COFER: Right. I want to see that.  
4 MR. COFER: Yeah, we'll stipulate to that, your  
5 Honor.  
6 THE COURT: All right. The death certificate's  
7 admitted. That's Exhibit 27.  
8 MR. SMITH: And 28, I guess you will stipulate.  
9 THE COURT: They did. They did not object to  
10 its admission.  
11 THE COURT: Now, I am really reluctant to spend  
12 a great deal of time going through these 54 pages. I,  
13 obviously most of it has not been identified, is not  
14 going to be admitted. So I'd rather concentrate on  
15 that which you are offering as opposed to that which  
16 obviously is not going to be offered. And I gather  
17 you are not prepared to do that at this point.  
18 MR. SMITH: We would appreciate some time if we  
19 could have it, your Honor.  
20 THE COURT: Would you be ready at 8:30 tomorrow  
21 morning.  
22 MR. SMITH: Yes, sir.  
23 THE COURT: When am I going to get the  
24 deposition you want to put in?  
25 MR. SMITH: As much leeway as you can give us.

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1 We can get them to you now, but I think we could do a  
2 better job if we have a little bit of time.  
3 THE COURT: Well, bring them back to my  
4 chambers so I can look at them. But I want opposing  
5 counsel to know what you are talking about.  
6 MR. SMITH: For sure.  
7 MR. COFER: Just tell us which ones you have  
8 limited it to.  
9 THE COURT: I'll come back out at quarter of  
10 five, and you can tell me what you got rather than  
11 leave it to chance. But by tomorrow morning at 8:30 I

12 expect you to tell me which exhibits you are offering.  
13 And so that we can have a meaningful expeditious  
14 resolution of the Plaintiff's Exhibits when you rest,  
15 I want you to rest with the understanding that your  
16 exhibits have been ruled upon so that we don't leave  
17 that to chance.

18 MR. SMITH: If I may ask the court one other  
19 question.

20 THE COURT: Sure.

21 MR. SMITH: Your Honor, you mentioned the issue  
22 of TI and TIRC, but we'll submit to you our thoughts  
23 on that.

24 THE COURT: Sure. Just show me what you want  
25 to offer. But the first thing is, if there has been

1308

1 no testimony about it, it is not coming in. I'm not  
2 going to admit exhibits for which there has been no  
3 testimony in the record.

4 MR. SMITH: Your Honor, may I ask something for  
5 the court to indulge on that.

6 THE COURT: You want me to change the rules of  
7 evidence?

8 MR. SMITH: Well, it's difficult to bring in  
9 witnesses to testify to things when there is a motion  
10 in limine on them. There are documents. I personally  
11 am of the belief, and I've done it in cases and I have  
12 to believe your Honor has, documents are properly  
13 authenticated, and the court considers them  
14 appropriate, they can go into evidence without a human  
15 being handling them, other than the attorneys who  
16 offer them. There is a lot of documents I would have  
17 to believe this court has permitted that to occur  
18 with.

19 And we would just ask the court to consider  
20 on the issue of those entities, the court considers  
21 the documents appropriate we are going to request to  
22 let them go in, that's all we can ask.

23 MR. McLAUGHLIN: Your Honor, can I just say  
24 something.

25 THE COURT: Sure.

1309

1 MR. McLAUGHLIN: I haven't joined in the fray,  
2 but I just need to, and maybe that's because it takes  
3 me longer than some of the very bright lawyers in this  
4 room to figure some of these things out. But after  
5 hearing Mr. Smith at the podium several times, what  
6 he's asking this court to do is unprecedented.

7 I have never seen a trial in the United  
8 States District Court where a party stands up and  
9 says, I want to do a document dump into the record. I  
10 don't want to call any witnesses to talk about those  
11 documents. I don't want to establish relevancy for  
12 what's coming in. I just think it is absolutely  
13 unprecedented. And I'm sure I'm not the only one in  
14 the courtroom who feels that way, but I wanted to make  
15 that comment, your Honor.

16 THE COURT: I appreciate that. I'm going to  
17 rule up or down on the exhibits, but I think the  
18 general rule is if the witness, if the exhibit has not  
19 been identified and not been testified about before  
20 the jury, it doesn't come in. Otherwise, the jury  
21 is -- I don't know what the jury is supposed to do  
22 with unidentified exhibits in the record.

23 I've tried to say this is not some kind of  
 24 research forum, this is a trial based on the pleadings  
 25 and the defenses. It is a narrow proposition, not a  
 1310

1 broad proposition.  
 2 Having said that, I'll be back out at quarter  
 3 to five.  
 4 (Brief recess.)

5 THE COURT: What do you have, Mr. Smith?  
 6 MR. SMITH: Your Honor, we would submit the  
 7 deposition of Heimann, Tucker --  
 8 THE COURT: That's the one we already talked  
 9 about, isn't it?  
 10 MR. SMITH: Yes, sir.  
 11 THE COURT: I thought it was Irwin.  
 12 MR. SMITH: Yes, sir, Dr Irwin Tucker.  
 13 THE COURT: You just said Heimann.  
 14 MR. SMITH: I'm sorry, there was a Heimann who  
 15 was President of American Tobacco at one time. We  
 16 submit his deposition to the court.  
 17 THE COURT: What's his first name?  
 18 MR. COFER: Richard, I think.  
 19 MR. NACE: Robert.  
 20 MR. SMITH: Robert.  
 21 THE COURT: Robert Heimann, H-E-I-M-A-N-N.  
 22 MR. SMITH: I believe so, your Honor.  
 23 THE COURT: This is the one we talked about the  
 24 other day.  
 25 MR. SMITH: Yes, sir.

1311

1 THE COURT: And this was taken when?  
 2 MR. SUFFERN: 1986 in the case of Horton versus  
 3 the American Tobacco Company, your Honor.  
 4 MR. NACE: December 19th.  
 5 THE COURT: Portland?  
 6 MR. SUFFERN: Horton, H-OR-T-O-N.  
 7 THE COURT: Versus American Tobacco.  
 8 MR. SUFFERN: Yes.  
 9 THE COURT: And what was his role at the time?  
 10 Was he President of American Tobacco?  
 11 MR. SMITH: He had been President and CEO. He  
 12 was not --  
 13 THE COURT: Past CEO?  
 14 MR. SMITH: Yes, sir.  
 15 THE COURT: How is his testimony relevant?  
 16 Just give me a quick summary.  
 17 MR. SMITH: Yes, sir, if I may have a second, I  
 18 had notes on that.  
 19 He helped organized the TIRC when he was  
 20 President of American Tobacco.  
 21 THE COURT: TIRC?  
 22 MR. SMITH: The Tobacco --  
 23 THE COURT: Institute.  
 24 MR. SMITH: I apologize.  
 25 THE COURT: No, go ahead, TIRC stands for?

1312

1 MR. SMITH: Tobacco Industry Research  
 2 Committee.  
 3 THE COURT: Okay.  
 4 MR. SMITH: And he was one of the organizers.  
 5 THE COURT: Okay.  
 6 MR. SMITH: He discusses, that's at page, your  
 7 Honor, I believe at page around page 31, 32 of his

8 deposition.

9 THE COURT: Well, have you indicated the pages  
10 of his deposition you want to produce?

11 MR. SMITH: Yes, sir, we did, in the -- we  
12 filed, as the court had requested, a designation of  
13 depositions we wanted to read.

14 THE COURT: Okay.

15 MR. SMITH: And we also have a copy of that  
16 here, too.

17 THE COURT: All right.

18 MR. SMITH: He testified that about the frank  
19 statement on page 31. Also at that location that they  
20 didn't screen doctors or professionals to determine if  
21 there was a problem, a medical problem with this  
22 product.

23 And then he speaks on page 35 that when Dr.  
24 Burney's statement, I think it is Dr. Burney, in 1958  
25 or '59 came out regarding health issues, and I believe  
1313

1 Burney, was he Surgeon General at that time? He was  
2 Surgeon General of the United States and they didn't  
3 get anyone together to see if there was truth to that  
4 at that time either.

5 On page 103 he indicates that American  
6 Tobacco never hired an epidemiologist, never set up a  
7 lab for health effects of smoking. And is one thing,  
8 I believe it is in this deposition, your Honor, that  
9 in fact -- yes, on page 35, Dr. Burney comes out  
10 indicating the problem he sees with smoking and lung  
11 cancer. Burney says they didn't call medical doctors  
12 to do it because that was TIRC's job. These companies  
13 delegated everything to TIRC and TI, as the court  
14 knows we've been submitting.

15 But there is a classic example of it. It  
16 even went to the level of health. They weren't going  
17 to do anything themselves, according to what Heimann  
18 said.

19 Page 104 he refers to being aware of the  
20 Gallup studies showing that lots of people didn't  
21 believe there was a problem.

22 106 he disagreed with anyone who said that  
23 smoking was hazardous to health. And that's despite  
24 the fact of his position and that he had held and his  
25 company's decision to not check out the truth of it.  
1314

1 He, in his deposition in 1986, he --

2 THE COURT: Why is the motive of the tobacco  
3 companies in not putting a warning on the packages  
4 regarding the dangers of health from 1950 to 1965, why  
5 is the motive relevant if it's been established they  
6 didn't do it?

7 MR. SMITH: Your Honor, we -- we understand the  
8 court's concern about not improperly getting punitive  
9 damages to a jury; but, your Honor, we believe that  
10 when the court looks at that, the court will see  
11 relevance to a, quote, conscious disregard when a  
12 company faced -- confronted with what they are  
13 receiving says we are not going to examine it, that's  
14 TIRC's role, and then --

15 THE COURT: So this is testimony in support of  
16 punitive damage testimony?

17 MR. SMITH: Yes, it is, your Honor. Yes, it is  
18 at least part of it.

19 THE COURT: Is there anything else to it  
20 besides that?  
21 MR. SMITH: Yes, sir, I think it does, because  
22 it goes to whether a responsible person in the  
23 position of a manufacturer knew enough or should have  
24 known enough to warn of the risk. So this goes to  
25 what that they knew or should have known. We do  
1315  
1 believe it as well goes to the duty to warn.  
2 THE COURT: Well, have the tobacco companies in  
3 this case offered the proposition that they didn't  
4 know enough to so that they were justified in not  
5 warning? I haven't heard that testimony.  
6 MR. SMITH: Well, your Honor, they say, they  
7 dance on that, in my judgment. They say to the court,  
8 well, we might have heard it.  
9 THE COURT: Why don't we wait until we hear  
10 their case before we decide where we are.  
11 MR. SMITH: I just want to make sure we are  
12 bringing it to the court's attention.  
13 For instance, your Honor, on that, I mean  
14 when he says, he says it in a deposition in 1986 at  
15 page 107 of his depo that he agreed 25 years ago,  
16 which would have been in '61, that smoking was  
17 statistically associated with lung cancer.  
18 Now, if he agreed with that and wouldn't even  
19 issue a warning or partial warning at a time when he  
20 was assistant to the President of American Tobacco, we  
21 think it's relevant.  
22 Those are -- there may be other areas in  
23 there, your Honor, but those are ones that I jotted  
24 down.  
25 THE COURT: Okay.  
1316  
1 MR. SMITH: He testifies that, as far as he  
2 believes, that all of the companies that were involved  
3 with TI.  
4 MR. COFER: Your Honor, do you want to hear  
5 background context from us?  
6 THE COURT: Not until he's through with the  
7 particular witness.  
8 MR. SMITH: Your Honor, that's basically what  
9 we believe.  
10 THE COURT: It has to do with Heimann.  
11 MR. SMITH: Yes, sir.  
12 THE COURT: You are going to give me the  
13 deposition?  
14 MR. SMITH: Yes, sir.  
15 THE COURT: All right.  
16 Response.  
17 MR. COFER: Well, what I was going to say is,  
18 with respect to TIRC, and it was in the frank  
19 statement, the company set up TIRC and said we are  
20 going to give them money and they are going to have a  
21 board of independent scientists and they are going to  
22 conduct research into smoking and health.  
23 And so when he said he was asked, well, did  
24 you do that?  
25 Well, no, TIRC was doing it. We gave the  
1317  
1 money to TIRC.  
2 With respect to your other comment, I told  
3 the jury in opening statement, remember Mr. Smith, as

4 I think, said very adroitly, their position is,  
5 Mr. Tompkin knew but they didn't know.  
6 And I said, oh no, our position is  
7 Mr. Tompkin knew and we knew, we all knew.  
8 That was our position.  
9 If you recall --  
10 THE COURT: You are going to have a witness  
11 testify to that? Because I've already told the jury  
12 what you say in opening statement does not constitute  
13 evidence. So you know, unless you have a witness  
14 that is going to say we knew, that's really not in the  
15 evidence.  
16 MR. COFER: Well, I think I implicitly did when  
17 I had Joan Hoff say here is everything, the public  
18 literature, and when Russ said on cross either with  
19 her or Blum, whose in box did it land in? I think  
20 it's already in the evidence or in the record with  
21 Blum and Hoff.  
22 THE COURT: Hoff can't testify for the tobacco  
23 companies and say that they knew.  
24 MR. COFER: Well, she testified it was public  
25 knowledge; and if it is public knowledge for the

1318

1 public it is public knowledge for us, too.  
2 MR. SUFFERN: Your Honor, may I adjust a couple  
3 other comments about Heimann and I'll be brief. I  
4 especially don't want -- I imagine we had some of  
5 these on Friday when we raised these issues. There  
6 are legal reasons why Mr. Heimann's testimony from  
7 this deposition shouldn't be admissible in the  
8 deposition in this case. Under federal evidence Rule  
9 801(D)(2) there is a requirement that the statement to  
10 be counted as an admission against a party needs to be  
11 made during the existence of the agency relationship.  
12 This deposition was taken six years, I  
13 believe six years after he was no longer employed by  
14 American Tobacco. Don't quote me on the six years,  
15 your Honor, but it certainly was after, and several  
16 years after the existence of the agency relationship.  
17 Also, if your Honor has the time to read the  
18 entire deposition, and I don't know if Mr. Smith is  
19 limiting his proffer to this specific pages and lines  
20 he just mentioned or if he's offering the entire  
21 deposition, but if he's offering the entire  
22 deposition, it is fraught with references to events  
23 that occurred long after the period of 1965.  
24 We laid those out in our briefs on these  
25 issues, your Honor, and those are in the record.

1319

1 THE COURT: Thank you.  
2 MR. COFER: The last thing, if I may, your  
3 Honor, in response to your question. It is in the  
4 record, the frank statement which Russ established  
5 that the defendants put out. It says, first  
6 paragraph, "recent reports on experiments with  
7 myself." So the companies themselves have admitted  
8 that they were aware of those studies.  
9 THE COURT: So you are not going to object to  
10 the admission of the drunk statement? As an exhibit?  
11 MR. COFER: May I think about that or do you  
12 want an answer right now?  
13 THE COURT: Well, I gather from what you said  
14 is you assumed that was coming in, you weren't going

15 to object to it.  
16 MR. COFER: Okay, I assume that's coming in and  
17 I'm not going to object to that.  
18 THE COURT: How about the other companies?  
19 Anybody else going to object to it?  
20 MR. McLAUGHLIN: Well, the -- no, we'll stand  
21 with Mr. Cofer on the frank statement, but with  
22 respect to just in general your Honor, we would take  
23 the position that exhibits, documents used on cross  
24 examination, such as Mr. Smith used in the cross  
25 examination of Dr. Hoff, would not be admitted into  
1320  
1 evidence in plaintiff's case in chief. Proper cross  
2 examination, as the court ruled, but it doesn't make  
3 those documents admissible in plaintiff's case in  
4 chief.  
5 THE COURT: You are going to object?  
6 MR. McLAUGHLIN: I'm going to object to the  
7 other documents. If Mr. Cofer makes a decision that  
8 there is no objection to the frank statement we'll  
9 live with that, but we certainly do object.  
10 THE COURT: I'm just focused on the frank  
11 statement. You are not going to object?  
12 Are you going to object?  
13 MR. WALSH: Judge, on behalf of Liggett.  
14 Liggett was not a part of the party to the frank  
15 statement or the meetings that led up to the frank  
16 statement, and I believe Mr. Smith conceded to that at  
17 the time of cross examination of Joan Hoff.  
18 THE COURT: So you are not going to admit to  
19 it?  
20 MR. WALSH: No, but we are going to object to  
21 it.  
22 THE COURT: You are going to object to things  
23 not relevant.  
24 MR. WALSH: I am going to object to it being  
25 used without a direct witness.  
1321  
1 THE COURT: What is the position of the fourth  
2 defendant?  
3 MR. SUFFERN: American Tobacco's statement is  
4 that we would be willing to stipulate that the frank  
5 statement appeared on the date that it appeared in  
6 several newspapers throughout the United States, but  
7 that would be the limit that would be our position.  
8 THE COURT: I'm not talking about stipulations.  
9 Are you going to object to its admission?  
10 MR. SUFFERN: On those grounds we would not  
11 object to that document.  
12 THE COURT: It is not going to have any big  
13 speech; it is either in or out.  
14 MR. SUFFERN: No, for the frank statement, for  
15 the reasons just stated, we will not object to that  
16 document.  
17 THE COURT: Thank you.  
18 MR. SMITH: May I respond briefly?  
19 THE COURT: I don't know. You are a winner  
20 now. What do you want to do, talk them out of it?  
21 MR. SMITH: No, I really don't your Honor.  
22 THE COURT: What do you want to tell me then?  
23 MR. SMITH: There is something that circles  
24 underneath the case and it is a tremendous piece of  
25 lawyering. I'm making out, I guess.



1 THE COURT: You are the one that decided to sue  
2 four defendants.

3 MR. SMITH: Oh, your Honor, I don't regret it.  
4 My body does sometimes. But, your Honor.

5 THE COURT: You have invited them to the party.

6 MR. SMITH: They all showed up. But your  
7 Honor, it's this.

8 Attorney Cofer says we -- I forget the  
9 word -- we admit we knew, and they do admit they knew.  
10 But they admit they knew that someone out in the  
11 wilderness was hollering that smoke killed, causes  
12 lung cancer. They are not admitting, I don't  
13 believe -- I love to be corrected, but they are not  
14 admitting that they knew then that it did kill, it did  
15 cause lung cancer.

16 Conversely, they say David Tompkin --

17 THE COURT: I've got all that. Let's move on,  
18 you know. So far I have covered one deposition, it is  
19 five o'clock. The reporter is tired, I'm tired and  
20 you want me to read these depositions tonight.

21 MR. SMITH: Yes, sir.

22 THE COURT: Next deposition.

23 MR. SMITH: Next deposition, your Honor, is one  
24 I think we discussed was Tucker.

25 THE COURT: Yeah, I've already been up and down

1 on Irwin Tucker.

2 MR. SMITH: Yes, sir.

3 THE COURT: I've already got that one.

4 What's the third deposition?

5 MR. SMITH: The third deposition is a gentleman  
6 by the name of Carl Thompson.

7 THE COURT: Okay. Who is he when was it taken?

8 MR. SMITH: Your Honor, it was in a deposition  
9 of Chip Alone versus Liggett on January 9th, '85. He  
10 was an employee of Hill & Knowlton. He talks about  
11 the relationship between Hill & Knowlton and the  
12 Tobacco Industry Research Committee. He also talks  
13 about it was his responsibility to get the medical  
14 literature to the SAB, which was the Scientific  
15 Advisory Board committee of TIRC, which I think  
16 further establishes it clearly that they were getting  
17 the medical literature.

18 THE COURT: Okay. How is it relevant?

19 MR. SMITH: It is relevant, we believe to --

20 THE COURT: What does it prove?

21 MR. SMITH: It establishes a heightened  
22 knowledge, we believe, of the risk enhancing  
23 increasing their duty to warn. And we believe it goes  
24 to conscious disregard in their refusal.

25 THE COURT: Have you heard any testimony yet

1 for them to say that they didn't have any knowledge of  
2 the risk?

3 MR. SMITH: I think, yes, sir, that's what  
4 troubles me.

5 THE COURT: Who did you hear it from? The only  
6 defense witness so far is Hoff. She didn't testify to  
7 that?

8 MR. SMITH: I guess that's true. I heard it  
9 from the lawyers.

10 THE COURT: Well, the lawyers don't testify,

11 the witnesses testify.  
12 MR. SMITH: And she came very close to gagging  
13 when she had to admit that she thought they probably  
14 had heard about it, but I don't think she ever  
15 admitted they knew it.  
16 THE COURT: Well, she doesn't. She was called  
17 as an expert, she wasn't called as a fact witness.  
18 I'm still waiting to hear a tobacco company witness  
19 come in and say we didn't know there was a problem.  
20 Now that, if they produce that kind of testimony in  
21 the period that we are talking about, then I'll take  
22 another look at this. But that hasn't happened yet.  
23 MR. SMITH: Let me, so that -- I don't want to  
24 abuse the court's time, I really don't.  
25 THE COURT: No, but I'm just trying to get you  
1325  
1 focused on the fact what you are pushing at me now may  
2 well be rebuttal testimony, if in fact they cast on  
3 the waters the bread of we didn't know there was a  
4 problem; therefore, we didn't have to, we didn't have  
5 to issue a warning. Even though all these poor people  
6 out in the general public they knew there was a  
7 problem, but we didn't.  
8 I mean, that's what you said has been their  
9 posture, but I thought counsel for the tobacco company  
10 shifted gears and said yeah, we knew too.  
11 So I'm waiting for the first tobacco company  
12 which is to come in and say, boy, we were sure  
13 surprised. We didn't know there was any problem  
14 between smoking and lung cancer in 1950 to 1965.  
15 When that happens, come back and talk to me  
16 about your rebuttal testimony. But I don't understand  
17 why you are trying to get it in at this point.  
18 MR. SMITH: I think what they will say --  
19 THE COURT: I don't know what they are going to  
20 say, that's why I'm here. I haven't heard what they  
21 were going to say.  
22 MR. SMITH: I think they are going to say, your  
23 Honor, we knew there were crazies out there saying it  
24 was connected, that's the position of their clients.  
25 THE COURT: Well, I'm waiting to see the first  
1326  
1 witness that comes in and says that that represents a  
2 tobacco company.  
3 MR. SMITH: Or they will just stand mute on it.  
4 THE COURT: Then it seems to me you are in  
5 great shape, you've got all kinds of testimony it was  
6 a problem and it didn't warn. They are fighting you  
7 on the common knowledge ground, counselor, and  
8 proximate cause.  
9 MR. SMITH: Your Honor, I don't want, if it  
10 gets me in trouble, I would be lying to the court if I  
11 didn't say that I want to get a punitive damage award.  
12 THE COURT: I understand it. Right now I ruled  
13 against you.  
14 MR. SMITH: Just on behalf, I think punitive  
15 damages are for the public and I have strong  
16 convictions.  
17 THE COURT: The money is going to be donated to  
18 the public?  
19 MR. SMITH: The only thing I would say about it  
20 is this, your Honor. My client, my client will do a  
21 lot more good with that money than these tobacco

22 companies ever will.  
23 THE COURT: Well, I've already ruled on  
24 punitive damages; I don't want to revisit that.  
25 I want to know what these depositions are  
1327  
1 that you want me to read and why I should have let you  
2 put that in your case in chief.  
3 MR. SMITH: One thing on punitive damages, the  
4 court has asked us to show you the documents of TI and  
5 TIRC that we want to get in, or for one whatever issue  
6 in we could impose on upon the court to maybe re-read.  
7 And we filed a short brief and a long brief.  
8 In effect, the short brief says where we  
9 think we are going, and the long brief lays those  
10 documents out as best we knew how. The court will  
11 make, you know, your own judgment.  
12 THE COURT: Counselor, do you have any concept  
13 of the various things that are on my mind and all the  
14 other cases that are going on in this courthouse?  
15 MR. SMITH: Your Honor, it must be awesome.  
16 THE COURT: Well, it borders on being mind  
17 boggling. I don't have the time to revisit and  
18 revisit and revisit an issue.  
19 Now, I've said no on punitive damages, let's  
20 move on.  
21 MR. SMITH: The next deposition, your Honor, is  
22 of Dunn.  
23 THE COURT: D-U-N-N.  
24 MR. SMITH: Yes, sir, William L. Dunn, Jr.  
25 THE COURT: All right.  
1328  
1 MR. SMITH: And the reason we were --  
2 THE COURT: Who is he? Tell me who he is.  
3 MR. SMITH: He was a senior scientist at Philip  
4 Morris. And he worked there from '61 until '86.  
5 THE COURT: All right. And he was deposed  
6 after '86?  
7 MR. SMITH: In 1997, yes, sir, in the Minnesota  
8 versus Philip Morris case.  
9 THE COURT: All right.  
10 MR. SMITH: On July 9th, '97.  
11 Q What does he say in 1997 that's relevant in this case  
12 about what happened from 1950 to 1965?  
13 MR. SMITH: Your Honor, what we submit is  
14 relevant is that he testified that in 1961 he was  
15 assigned to initiate a research program that addressed  
16 the questions of why, how and what people wanted to  
17 smoke. We don't -- as opposed to safety of smoking,  
18 it was research on how to get people to smoke.  
19 THE COURT: And that establishes?  
20 MR. SMITH: In our belief, your Honor, it  
21 establishes conscious disregard for the health of the  
22 people.  
23 THE COURT: All right. Don't bother with that  
24 deposition, I'm not going to let that in.  
25 MR. SMITH: Your Honor, there is a deposition  
1329  
1 of Fred Panzer.  
2 THE COURT: Panzer.  
3 MR. SMITH: Yes, sir, P-a-n-z-e-r.  
4 THE COURT: Okay.  
5 MR. SMITH: Give me one second, I'm trying to  
6 get there.

7 But he wrote a memo -- while I'm looking, he  
8 wrote a memo in 1972 or thereabout, to his boss. He  
9 was, he was an employee of the Tobacco Institute from  
10 1969 until 1990 when he retired. And on May the  
11 first, 1972, he wrote a four page memo to Horace R.  
12 Kornegay. And I believe that's K-o-r-n-e-g-a-y. And  
13 it was triggered by a Burns Roper proposal doing a  
14 poll that they thought the tobacco company might want  
15 to do.

16 What he did, he reviewed the past 20 years of  
17 the Tobacco Institute's efforts, which would, as I  
18 understand it, would, you know, go back to '72. So he  
19 must have -- technically he must have meant in reality  
20 the TIRC would have started in '54, and I think the  
21 Tobacco Institute was about '57.

22 But he says this.

23 While in fact this is what it is. He says,  
24 "for nearly 20 years, this industry has employed a  
25 single strategy to defend itself on three major

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1 fronts; litigation, politics, and public opinion.  
2 While the strategy was brilliantly conceived and  
3 executed over the years, helping us win important  
4 battles, it is only fair to say that it is not nor was  
5 it intended to be a vehicle for victory.

6 On the contrary, it has always been a holding  
7 strategy. Consisting of creating doubt about the  
8 health charge without actually denying it. Advocating  
9 the public's right to smoke without actually urging  
10 them to take up the practice. Encouraging objective  
11 scientific research as the only way to resolve the  
12 question of health hazard."

13 Then the next four words are underlined.

14 "On the litigation front, for which the  
15 strategy was designed, it has been successful. While  
16 we have not lost a liability case, this is not because  
17 juries have rejected the anti-smoking arguments."

18 And then it goes on.

19 But that's a look back as to what, when he  
20 was writing this memoranda to his boss and he looked  
21 back over the history, he was able to put together.

22 THE COURT: And how does that bind either or  
23 any of the four defendants in this case?

24 MR. SMITH: Your Honor, we would ask the court  
25 to consider it as being relevant to them. Because

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1 they created the Tobacco Institute, they controlled  
2 the Tobacco Institute, they utilized the Tobacco  
3 Institute as their public relations arm to create  
4 doubt and confusion without denying it.

5 THE COURT: You sued them, you attempted to sue  
6 them in an amended complaint, and I threw it out;  
7 didn't I?

8 MR. SMITH: I believe, your Honor, you threw it  
9 out because you held it wasn't timely, but the court  
10 didn't pass upon.

11 THE COURT: And the defendants have not been  
12 called upon to defend in this case on the proposition  
13 that they show used the Tobacco Institute as their  
14 pawn in this case. That's just not a part of the  
15 pleadings in this case, is it?

16 MR. SMITH: Your Honor, to answer the court's  
17 question directly, the pleading does not say that per

18 se. But the court has many cases wherein parties act  
19 through agents and people that you work for.  
20 THE COURT: Well, to the extent it might be  
21 relevant, the prejudice outweighs the relevance. I'm  
22 not going to hear it under all the circumstances in  
23 this case. It seems to me if I were to permit that  
24 in, I open a whole new cause of action, if you will,  
25 or at least a whole new approach that the defendants

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1 are not on notice that it was going to be employed  
2 against them. Given the state of the pleadings, I am  
3 not going to let it in, Mr. Smith. And you have your  
4 objections, your exceptions.

5 MR. SMITH: Yes, sir.

6 Your Honor, the next deposition is of Bennett  
7 LeBow m-e-b-o-w. And Bennett has two Ns and two Ss.  
8 It is in the Minnesota versus Philip Morris case  
9 deposition of September 29th, 1997. At that time, he  
10 was the owner of Liggett and still is. He controls  
11 the -- he has the ability to control the company, from  
12 everything I understand, your Honor. It I could be  
13 proven wrong, but I don't think so.

14 he testified as follows -- and this is a  
15 gentleman who was the President of Liggett when he said it,  
16 and is the President of Liggett today

17 Over the year, he decided that the tobacco  
18 companies were allying regarding the defenses they were  
19 making, including cigarettes causing disease. He made the  
20 admissions that he did, on behalf of Liggett, in order to  
21 stop the farce, and because it was the right thing to do.  
22 And he would do it again in a second.

23 And, your Honor, I think the deposition shows  
24 that what happened, I believe, is his grandchild asked him  
25 what he did for a living. And it got to him. That's what

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1 he says under oath in his deposition.

2 Liggett hasn't objected to these statements, but  
3 the non-Liggett defendants have.

4 He doesn't testify regarding causation or  
5 liability, as the non-Liggett defendant's stated in their  
6 brief. He simply states that the defendants they have been  
7 putting forth are a farce, since they, in the past, were  
8 jointly making these statements. And since he is qualified  
9 to assess the history of his company, we request that this  
10 deposition or else he live, be permitted not only to  
11 testify that the statements his company made were a farce,  
12 but to also identify the companies with whom they were  
13 making these statements

14 THE COURT: Do you have that deposition to  
15 provide me?

16 MR. SMITH: Yes, sir.

17 THE COURT: And this is not trial testimony,  
18 this is deposition testimony?

19 MR. SMITH: Yes, sir. Let me double check  
20 that, your Honor. I have a note it is the deposition.

21 MR. PROCTOR: It is the deposition testimony,  
22 your Honor, from 9/29/97 in the state of Minnesota  
23 Attorney General case.

24 THE COURT: Well the defendants want to be  
25 heard on that one.

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1 MR. PROCTOR: Your Honor, Craig Proctor on  
2 behalf of Lorillard Tobacco Company.

3           The primary reason why Mr. LeBow's statements  
4           should not be admissible in this case, it violates  
5           your Honor's post 1965 ruling he did not even come to.  
6           It wasn't Liggett, it was the Brooke Group, the parent  
7           company.

8           THE COURT:   Excuse me?

9           MR. PROCTOR:  Mr. LeBow did not work for  
10          Liggett, he worked for their parent company, Brooke  
11          Group.  He was the President of Brooke Group, not  
12          Liggett.

13          THE COURT:  Did that company own Liggett?

14          MR. PROCTOR:  Yes, he did.  But I'll let  
15          Mr. Walsh address the intricacies of that.  He did not  
16          get there until the 1980's.

17          THE COURT:  Possibly he's a historian.

18          MR. PROCTOR:  He is not a historian, he doesn't  
19          even talk about activities in the 1960's.  He's  
20          talking about the context of the master settlement  
21          agreement that occurred in the late 1990's with all  
22          the tobacco companies and attorneys generals.  He  
23          stated he settled with the attorneys general because  
24          he didn't like the position Liggett was taking, and he  
25          thought he didn't like the position the other

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1          companies were taking.

2           It's all litigation context and all dealing  
3           in the time frame of the 1990's and 1980s.  It  
4           violates your post 1965 order, and frankly is  
5           prejudicial to the other defendants.  He was  
6           completely adverse to us at that time.

7           THE COURT:  Well, the fact that he is adverse  
8           to you doesn't make it inadmissible, does it?

9           MR. PROCTOR:  As against any other defendant,  
10          it cannot be an admit to any other defendant.

11          MR. COFER:  Can I give the court a little more  
12          context?  What happened is Liggett cut a deal with the  
13          AGs with Ron Motley and Scruggs and the others.  And  
14          part of the deal was they were -- they would cooperate  
15          and essentially clip on the other defendants.

16          LeBow bought the company later.  He's the one  
17          who cut the deal through the new law firm, and this  
18          was part of his agreement to essentially get his  
19          company off the hook on the cheap of the AG cases.

20          THE COURT:  So.

21          MR. COFER:  So we did not have first -- he  
22          didn't have any firsthand knowledge as to what the  
23          companies' positions were.  He was not with the  
24          company between 1950 and 1965, so he doesn't know the  
25          basis for the companies' positions.  He testified he

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1          wasn't aware of the company's positions until after  
2          sometime, I think, in the '90's in the AG cases.

3           THE COURT:  How long is the deposition?

4           MR. COFER:  I'm sorry?

5           THE COURT:  How lengthy is the deposition?

6           MR. SMITH:  Your Honor, it is fairly lengthy.  
7           I think we can --

8           THE COURT:  How lengthy is it?

9           MR. SMITH:  How many designated pages?

10          THE COURT:  I have found if I'm going to  
11          consider something like this I have to read the whole  
12          thing.

13          MR. SMITH:  It is long, your Honor.

14 THE COURT: I understand it's long.  
15 MR. SMITH: 393 pages, sir.  
16 THE COURT: Thank you.  
17 MR. WALSH: Your Honor, as for Liggett's  
18 position in this. We didn't object formally at the  
19 time because of your court's order that indicated you  
20 wanted to reserve objections for decision at the time  
21 of trial. I have prepared formal objections and  
22 they are here in hard copy with regard to those pages  
23 that were designated by the plaintiff in this.  
24 As for Mr. LeBow, he invested in a tobacco  
25 company for the first time in 1986 having had no prior  
1337  
1 involvement in the tobacco industry. And his  
2 testimony indicates that he really didn't become aware  
3 of the health issue as affected Liggett until about  
4 1995. So Liggett resolved its issues in the state of  
5 Minnesota and he testified --  
6 In this designated section of his deposition,  
7 he testifies and makes really what I would consider  
8 lay comments about addiction, youth smoking, nicotine,  
9 advertising, the Tobacco Institute.  
10 Hill & Knowlton and, I might say that my  
11 client Liggett had no involvement with the so called  
12 Tobacco Institute Research Committee, was not involved  
13 in the Tobacco Institute from the time period 1950  
14 until 1965. Never had any involvement with Hill &  
15 Knowlton.  
16 And so he makes a number of comments about  
17 what, what motivated Liggett to settle in the state of  
18 Minnesota a couple of years ago.  
19 And there is really just a, it's really  
20 almost a comment that asks him to make a comment about  
21 the public stance in the industry about smoking and  
22 health and addiction, and comment as to why the so  
23 called industry took the positions for 40 years that  
24 it has.  
25 And he makes a comment that over the past 30  
1338  
1 or 40 years documents have been hidden from the public  
2 through lawyers. It's really kind of a nebulous  
3 nonspecific comment. As you can see, as the other  
4 defendant's objected, the comment really covers a time  
5 period that substantially is, is violative of the  
6 court's previous order which limits relevance in this  
7 case to 1965.  
8 THE COURT: Relevant evidence as to the conduct  
9 of the tobacco companies post '65?  
10 MR. WALSH: Right.  
11 THE COURT: But his, I haven't read his  
12 deposition, but as far as I know, he's commenting on  
13 what he's learned about what Liggett did for any  
14 number of years. I don't think the fact that he  
15 doesn't make the statement until 1997 means it's  
16 inadmissible.  
17 MR. WALSH: What I can indicate, there is no  
18 specific reference to any conduct of the industry  
19 that is really particularized or described within the  
20 time period 1950 to 1965.  
21 THE COURT: Was this a discovery deposition?  
22 MR. WALSH: It was a discovery deposition in  
23 advance of trial testimony that was later given in the  
24 Minnesota case a few months after the deposition.

25 THE COURT: The Liggett attorneys were present  
1339  
1 when he was deposed?  
2 MR. WALSH: I believe the other defendant  
3 attorneys were also parties to the case.  
4 THE COURT: Did they question him?  
5 MR. WALSH: Certainly they wouldn't have  
6 questioned him about anything relevant to the issue of  
7 warnings on packages in the period 1950 to 1965. We  
8 do have the deposition and the trial testimony, but I  
9 can't make a representation as to whether and to what  
10 extent he was cross examined by other defendants in  
11 this case.  
12 THE COURT: He then testified at trial after  
13 this deposition?  
14 MR. WALSH: He was called as a trial witness.  
15 THE COURT: But this is a discovery deposition?  
16 MR. WALSH: This is a discovery deposition.  
17 THE COURT: Taken by whom? Who was the, who  
18 called him for the purpose of the discovery  
19 deposition? Attorney General of Minnesota?  
20 MR. WALSH: I believe he was examined by Roman  
21 Silverfield representing the state of Minnesota and  
22 Blue Cross Blue Shield.  
23 THE COURT: All right. What were the products  
24 of Liggett that the defendant smoked? I mean that the  
25 plaintiff smoked.

1340  
1 MR. WALSH: Chesterfield brand cigarettes.  
2 THE COURT: Is that it?  
3 MR. WALSH: In 1957 to '59; the Lark brand  
4 cigarettes in '64 and '65.  
5 THE COURT: What was the name?  
6 MR. WALSH: Lark.  
7 THE COURT: Lark.  
8 Anybody else want to be heard on this one?  
9 Well, give me the deposition. I'll take it  
10 home and read it.  
11 What else do you have? Have we've gone  
12 through about five of them now?  
13 MR. SMITH: We have a couple more, your Honor.  
14 Your Honor, I did want to say one thing. The  
15 court made a statement I hadn't contemplated.  
16 THE COURT: We've done Tucker, we've done  
17 Heimann, that's two.  
18 MR. SMITH: Thompson.  
19 THE COURT: Thompson is three. Dunn is four.  
20 MR. COFER: Panzer.  
21 THE COURT: Panzer is five and LeBow is six.  
22 You told me you have six, I've done six.  
23 What more have you got?  
24 MR. SMITH: I wanted to just make one response  
25 to the question the court asked.

1341  
1 Your Honor, I would believe that if it was  
2 important to get this, what needs to be done, done,  
3 that something could be probably put together in the  
4 form of a stipulation or something, wherein the court  
5 could have control of punitive damages monies, if  
6 there is a concern.  
7 THE COURT: Thank you.  
8 Anything else?  
9 MR. SMITH: Yes, sir.



10           There is one question that has come up, your  
11 Honor. And when the court recommended the -- when I  
12 say the court, or court's designee for that matter,  
13 the question of identifying documents with a witness  
14 as opposed to proffering them to the court, and then  
15 being able to publish them to the jury, which I am  
16 familiar with in a couple of cases. Merriman, there  
17 are some of these witnesses identify a lot of  
18 documents in these depositions.

19           And we would like to submit those people as  
20 far as particularly in the Minnesota case, they went  
21 over a lot of documents and Merriman is one person  
22 that did a lot.

23           THE COURT: I am not going to rely on  
24 depositions in other cases for the admissibility of  
25 exhibits in this case. I'm simply not going to do  
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1       that.

2           Now do you have any other depositions you  
3 want me to examine? I thought you said six, I've  
4 already heard about six.

5           MR. SMITH: Your Honor, those are the ones we  
6 would offer for the court's examination.

7           THE COURT: Give me LeBow, Heimann, I think I  
8 indicated I'm not going to consider Dunn. And Panzer  
9 was an employee of Tobacco Institute.

10          MR. SMITH: Yes, your Honor he was.

11          THE COURT: I'm not going to consider that one.

12          And Thompson was an employee of Hill &  
13 Knowlton.

14          MR. SMITH: He was, your Honor.

15          THE COURT: I'm not.

16          MR. SMITH: Or wait, let me pause on that a  
17 minute.

18          That is correct, your Honor.

19          THE COURT: I'm not going to consider that one.

20          So you are going to give me Heimann, and  
21 LeBow, and I heard about tucker earlier; so Tucker --  
22 three depositions.

23          MR. SMITH: Yes, your Honor.

24          If we might trouble the court at some point  
25 to get copies back. I think there are only copies.  
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1       We have extras. I apologize.

2       THE COURT: As far as exhibits are concerned,  
3 will you have -- are you going to give the defendants  
4 a list of the exhibits that you are going to offer, so  
5 there is some kind of advanced preparation for the  
6 hearing tomorrow?

7       MR. SMITH: Yes, sir.

8       THE COURT: I don't want to devote a lot of  
9 time to this, if I can avoid it.

10       But you haven't done that yet? You haven't  
11 given them any list of exhibits yet that you intend to  
12 offer.

13       MR. SMITH: No, sir.

14       THE COURT: When do you suppose you can get  
15 that list to them?

16       MR. SMITH: We are in the process of trying to  
17 really smooth it out. But we could have it to them in  
18 the next couple of hours.

19       I'm asking the guy who is doing the hardest  
20 work. Next couple of hours be okay?

21 THE COURT: And you know where to get ahold of  
22 them?  
23 MR. SMITH: We'll be together. We know how to  
24 find them.  
25 THE COURT: Now, if the court should conclude  
1344  
1 that parts of these depositions should be read to the  
2 jury, I'll make that ruling tomorrow morning.  
3 We'll start at 1:00. The only witnesses I  
4 understand that the plaintiff is going to call, other  
5 than deposition testimony, if I allow it, is  
6 Mr. Tompkin's brother, is that correct?  
7 MR. SMITH: Yes, sir.  
8 THE COURT: Well, hopefully I'll have a ruling  
9 fairly early tomorrow about these depositions so you  
10 can get prepared based upon what my ruling is, but be  
11 prepared to go ahead early tomorrow afternoon.  
12 But I want to see counsel with respect to  
13 exhibits. Let's call it 10:00 o'clock tomorrow  
14 morning. Hopefully by 10:00 o'clock I'll know where I  
15 am on these deposition.  
16 MR. SMITH: Your Honor, we have a video of  
17 Mr. Heimann, if the court wants to look it.  
18 THE COURT: No, I can read faster than I can  
19 watch it.  
20 MR. SUFFERN: Your Honor, at the risk of trying  
21 the court's patience, may I make one comment about  
22 Irwin Tucker?  
23 We would request if you do find portions of  
24 his testimony admissible, it would include a limiting  
25 instructions to his doctor's testimony regarding his  
1345  
1 inability to answer questions in a coherent way, based  
2 on his mental capacity.  
3 I said we briefed that. If your Honor would  
4 like copies of those affidavits or briefs, I could  
5 provide them.  
6 THE COURT: I don't know how you get that in.  
7 If I allow that to be in, I guess you would be  
8 prepared to call witnesses in to bring that in.  
9 We are still a court of law where we do  
10 things according to the Rules of Evidence. Sometimes  
11 I think the lawyers have concluded the Rules of  
12 Evidence really don't apply in this case.  
13 MR. SUFFERN: Your Honor, this is a Brown and  
14 Williamson employee, and we thought your Honor's  
15 ruling excluding evidence from Brown and Williamson  
16 was clear. And for that reason we did not have any  
17 witnesses to testify in this matter, but we would ask  
18 the court to consider giving a limiting instruction on  
19 his mental capacity.  
20 THE COURT: Give me the background on Brown and  
21 Williamson.  
22 MR. SUFFERN: American Tobacco Brands were  
23 merged into Brown and Williamson in 1995. Yes, your  
24 Honor. And Mr. Tucker was never an employee of the  
25 American Tobacco Company. He was testifying about  
1346  
1 events that occurred while he was an employee of Brown  
2 & Williamson at a time when Brown & Williamson had no  
3 stake in American Tobacco.  
4 THE COURT: And you don't consider that he be a  
5 fact witness for any purpose, just generally speaking.

6 MR. SUFFERN: Absolutely not, your Honor.  
7 Your Honor, his personal opinions about what  
8 he thinks might have been happening in the industry at  
9 the time are not probative of any knowledge that the  
10 defendants companies in this case might have.  
11 They are nothing other than his personal opinions from  
12 a non-party to the case.  
13 THE COURT: Help me in this, Mr. Smith. Why  
14 are his statements admissible?  
15 MR. SMITH: Your Honor, he's testifying insofar  
16 as the events at The Plaza Hotel in December of '53 as  
17 an eyewitness as to what occurred. He's testifying as  
18 an eyewitness as to what occurred between Hill &  
19 Knowlton and TIRC as well.  
20 His testimony --  
21 THE COURT: What happened in 1953 at the Plaza  
22 Hotel --  
23 MR. SMITH: Your Honor --  
24 THE COURT: -- that proves your case?  
25 MR. SMITH: Your Honor, insofar as it affects  
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1 our case?  
2 THE COURT: No, as far as it proves your case.  
3 MR. SMITH: Well, we had thought we had  
4 represented to the court, and still believe that it,  
5 number one, it shows their conscious disregard of the  
6 safety of the American people.  
7 THE COURT: Anything else?  
8 MR. SMITH: We think it goes to their actual  
9 knowledge of the mouse painting studies that developed  
10 tumors, which they did not controvert. Which we  
11 submit on the duty to warn issue they have actual  
12 knowledge of the danger based upon that, is our  
13 position, your Honor, and our belief. That's highly  
14 relevant to that.  
15 THE COURT: Thank you.  
16 MR. SMITH: Yes, sir.  
17 THE COURT: Anything further?  
18 MR. WALSH: Just, I have a hard copy of the  
19 objections on the Bennett LeBow testimony. I would  
20 like to give it to you.  
21 THE COURT: Fine that would be helpful.  
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1 C E R T I F I C A T E  
2 We, Susan Trischan and Richard G. DelMonico,  
3 Official Court Reporters, in and for the United  
4 States District Court, for the Northern District  
5 of Ohio, Eastern Division, do hereby certify  
6 that the foregoing is a true and correct transcript  
7 of the proceedings herein.  
8  
9

10 - Susan Trischan  
11 Official Court Reporter  
12

13 Richard G. DelMonico  
Official Court Reporter

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